152 U S 262

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 224.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

DAVID GEORGE McDONALD, BY MARY E. McDONALD, HIS NEXT FRIEND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 8, 1890.

(14,224.)

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 16th day of March, A. D. 1885, came David George McDonald, by his next friend, Mary E. McDonald, by Messrs. Patterson & Thomas, his attorneys, and filed in said court his complaint and sued out of and under the seal of said court a writ of summons against the Union Pacific Railway Company.

And the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States in and for said District.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 1704.

Complaint.

The above-named plaintiff, David George McDonald, by his next friend, Mary E. McDonald, chosen and selected by him as such, complains of The Union Pacific Railway Company, defendant, and says:

First.

That the said David George McDonald and his next friend, Mary E. McDonald, are citizens of the State of Colorado, and the Union Pacific Railway Company is a corporation organized and
2 existing under and by virtue of the laws of the United States and is and was at the times hereinafter mentioned doing business within the district of Colorado.

Second.

That the amount and sum in controversy, exclusive of costs, exceeds $500.

Third.

That the said defendant company, at the times hereinafter stated, was owning and operating within the limits of the State of Colorado a certain line of railway running in and through the counties of Weld and Boulder, in said State; that in addition thereto the said defendant company was also owning and operating a certain coal mine near the town of Erie, in the county of Weld, and which coal mine was immediately adjacent to the depot grounds of the said railway company at the said town of Erie; that in the work-

ing and operating of the said mine there had been deposited by the said railway company, through its agents and employees, and by the former owners and operators of the said mine, a large quantity of coal slack alongside and close by the said railway track of the defendant company and on the side of said track next to the said town of Erie; that the said slack had been dumped in such quantities as aforesaid along the line of the said railway company that the slack pile extended up and down by the side of said track for several hundred yards and was of a width, to wit, of from three to ten yards; that several years ago the said pile of coal slack caught fire and has burned continuously ever since; that at the happening of the injuries hereinafter complained of the said slack pile had so burned that a few inches beneath its surface there was a bed of burning coals for nearly the whole extent of said slack pile, while upon the surface thereof were mere ashes covering the said bed of
3 coals for a number of inches and concealing from the sight the fire beneath; that from said fire no smoke or evidence of its existence were emitted, and the whole mass, because of the covering with said ashes, appeared like a bed of dead and fireless ashes, and there were no indications that there was any danger whatsoever to be apprehended from walking upon or into the same; that the said slack pile thus burned and appearing as aforesaid was nearly level with the surrounding ground, and, because of the same having been on fire and burning for some years, it had burned the crust of the earth beneath it for a number of feet in depth, so that a pit was formed which contained and held the said burning coals with the apparently dead and fireless ashes covering the same; that the said slack pile in the condition aforesaid was upon the lands of the defendant company, and for several years before the happening of the injuries hereinafter complained of the said defendant company had full knowledge of the existence of the same and of the fact that it gave no indications of the existence of the said fire; that the said slack pile was in close proximity to the said town of Erie and within, to wit, a distance of two or three hundred yards of the most populous part of the said town; that the said town of Erie at the times aforesaid contained and now contains a population of from five to seven hundred people, a large percentage of whom are children, and that the locality of the said slack pile was frequented by the adults and children living in and about and visiting the said town of Erie; that the said defendant company had at the times aforesaid and hereinafter mentioned, full knowledge of the condition of the said slack pile; it knew of the bed of burning coals beneath, and that the same was covered with the ashes aforesaid, and that no indication was given of the presence of the fire therein; it knew that the same was in a locality frequented by the adults
4 and children who lived in and about the town of Erie and those who might visit the said town, and that a person ignorant of its condition was liable to go upon or into the same unsuspecting any danger therefrom.

Fourth.

That because of the public place wherein the said burning slack pile was and its locality being frequented by the adults and children of the said town of Erie and those visiting the same, and because of the fire therein being concealed as aforesaid, it became and was the duty of the said defendant company long before and at the time of the happening of the injuries hereinafter complained of either to have extinguished the said fire or to have removed the same or to have fenced or enclosed the said slack pile or to have put up some sufficient sign and warning notifying the public of the danger of going in or upon the same; yet the said defendant company, unmindful of its duty in the premises, did at the time of the happening of the injuries hereinafter complained of, and had for a long time before the happening of said injuries, negligently and carelessly permitted the same to be and remain in the said public place, and to be and remain without any sign or notice to the public of its dangerous character from the existence of the fire aforesaid, and to be and remain in said public place without any enclosure or barrier of any sort or character to prevent unsuspecting adults or children from going in and upon the same.

Fifth.

That the plaintiff, David George McDonald, was upon, to wit, the third day of September, A. D. 1884, a child of but twelve years of age; that he had gone to said town of Erie and vicinity with his mother for the first time but two days before, and he was at the time of the happening of the injuries complained of wholly ignorant of the condition of said slack pile, and was ignorant of the fact that it contained any fires whatsoever, and there were no signs to indicate to him or to any one else that said fire existed therein.

Sixth.

That at the date last mentioned the said plaintiff was in the neigborhood of the said depot and upon the other side of the said railroad track from the said slack pile, at or near to the shaft of the mine of said company, when some boys, who had been working in said mine, emerged from its shaft, and, seeing the plaintiff, the said boys, as if to frighten or injure the said plaintiff, ran towards him, and the plaintiff, not knowing them, and fearing they might be seeking to injure him, started and ran from them and towards the said town of Erie, where his mother was, and in so doing he was compelled to run across the track of the said defendant company; that for the reasons aforesaid he ran across said track, and not suspecting or fearing or having cause to suspect or fear danger or fire from the said slack pile and what appeared to be but dead and lifeless ashes and which were nearly level with the surrounding surface of the ground, and being pursued by said boys, and without fault or neglect upon his part, he, having crossed said track, continued straight forward on a run towards the town of Erie as afore-

said and sought to cross the said slack pile; that when his feet touched the same they sunk into it for some considerable distance, the same being soft and yielding, and because of his feet so sinking he, without fault upon his part, was thrown forward upon his hands and face into and upon the said slack pile; that upon being so thrown forward his hands and arms sank through the said ashes and into the bed of burning coals aforesaid and his face was partly buried in the same, and thereby and because thereof his hands and arms and face were badly burned, and because thereof his hands
6 and arms have become weakened and in part disabled, and his hands and arms and face were badly scarred and disfigured and his general health has been greatly and permanently impaired and his kidneys have become permanently weakened and diseased, and he suffered great pain and torture and was confined to his bed thereby for a long period of time and was thereby disabled for a long time from the use of his hands in any way whatsoever.

Seventh.

That because of the premises the plaintiff has been damaged in the sum of fifteen thousand dollars.

Wherefore he demands judgment for fifteen thousand dollars and all other relief.

PATTERSON & THOMAS,
Attorneys for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Mary E. McDonald, of lawful age, being first duly sworn, on her oath deposes and says she has been selected by the plaintiff as his next friend: that she has carefully read over the above and foregoing complaint: that she knows the contents thereof: that the same are true of her own knowledge.

MRS. MARY E. McDONALD.

Subscribed & sworn to before me March 13, 1885.
[SEAL.] MORT. B. SULLIVAN,
Notary Public.

7 (Indorsed:) 1704. U. S. circuit court, district of Colo. David George McDonald, by his next friend, Mary E. McDonald, *vs.* The Union Pacific R'y Co. Complaint. Filed Mar. 16, 1885. Edward F. Bishop, clerk. Patterson & Thomas, pl'ff's attorneys.

And the said summons and proof of service *is* in words and figures as follows, to wit:

Summons.

In the Circuit Court of the United States, District of Colorado.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff, *versus* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Complaint Filed in the Clerk's Office this 16th day of March, A. D. 1885.

The President of the United States of America to the Union Pacific Railway Company, Greeting:

You are hereby notified that an action has been brought in said court by David George McDonald, by his next friend, Mary E. McDonald, plaintiff, against you, as defendant, to recover the sum of $15,000.00 due from you, the said defendant, to the said plaintiff for injuries sustained by plaintiff from the carelessness and negligence of defendant in permitting a burning pile of coal slack alongside of its track near the town of Erie, in said district, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service: and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 16th day of March, A. D. 1885, and of the Independence of the United States the 109th year.

[SEAL.]

EDWARD F. BISHOP, *Clerk.*
By F. W. TUPPER, *Deputy Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DENVER, COLO., *March 23rd*, A. D. 1885.

I hereby certify that I received the within writ on the 16th day of March, A. D. 1885, and that I have personally served the same upon the said defendant, The Union Pacific Railway Company, by delivering to Edward Dickinson, assistant general superintendent

of said defendant company, personally, a true copy of the within writ at the time and place as follows: At Denver, county of Arapahoe, on the 23rd day of March, A. D. 1885. No president, vice-president, secretary, or treasurer of said company found in my district.

This writ, therefore, returned, executed as the law directs, this 23rd day of March, A. D. 1885.

WALTER A. SMITH, *Marshal.*
By JOHN W. BELCHER,
Deputy Marshal.

Marshal's Fees.

Service, 1 defendant, at $2.00	$2 00
Mileage, 2 m's, at 6c., going only	12
Total	$2 12

9 Paid by Patterson & Thomas.

(Indorsed:) Gen. No., 1704. Circuit court of the United States for the district of Colorado. David George McDonald, who sues, etc., plaintiff, *versus* The Union Pacific R'y Co., defendant. Summons. Filed this 23d day of March, A. D. 1885. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Patterson & Thomas, of Denver, attorneys for plaintiff.

And afterwards and on, to wit, the 2nd day of April, A. D. 1885, came the said defendant, by Messrs. Teller & Orahood, its attorneys, and filed in said court and in said cause its demurrer to the complaint heretofore filed herein.

And the said demurrer is in words and figures as follows, to wit:

Demurrer to Complaint.

In the Circuit Court of the United States, District of Colorado.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff,
v.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Demurrer.

Now comes the defendant in the above-entitled action and demurs to the complaint herein, and for cause of demurrer alleges—

That the said complaint does not state facts sufficient to constitute a cause of action.

TELLER & ORAHOOD,
Attorneys for Defendant.

10 (Indorsed:) 1704. U. S. C. C. David George McDonald *v.* The U. P. R'y Co. Demurrer to complaint. Filed Apr. 2, 1885. Edward F. Bishop, clerk. Teller & Orahood, att'ys for def't.

And afterwards and on, to wit, the 2nd day of May, A. D. 1888, the same being one of the regular juridical days of the May term, A. D. 1888, of said court—present, the Honorable David J. Brewer, circuit judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Demurrer to Complaint Sustained.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704.	Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the demurrer to the complaint herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court now here that the said complaint is not sufficient in law, and so the said demurrer is sustained.

And afterwards and on, to wit, the 8th day of May, A. D. 1888, the same being one of the regular juridical days of the May term, A. D. 1888, of said court—present, the Honorable David J. Brewer, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Leave to Amend Complaint.

11	DAVID GEORGE MCDONALD, by His Next Friend, Mary E. McDonald, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704.	Action for Damages.

At this day comes the said plaintiff, by C. S. Thomas, Esq., her attorney, and on her motion it is ordered by the court that she have leave to amend her complaint herein in sixty (60) days from this day, as she shall be advised.

And afterwards and on, to wit, the 3rd day of August, A. D. 1888, came again the said plaintiff, by J. Warner Mills, his attorney aforesaid, and filed in said court and in said cause his amended complaint against the said defendant.

And the said amended complaint is in the words and figures as follows, to wit:

Amended Complaint.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States in and for said District.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 1704.

Complaint.

The above-named plaintiff, David George McDonald, by his next friend, Mary E. McDonald, chosen and selected by him as such, complains of The Union Pacific Railway Company, defendant, and says:

12 First. That the said David George McDonald and his next friend, Mary E. McDonald, are citizens of the State of Colorado and the Union Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States, and is and was at the times hereinafter mentioned doing business within the district of Colorado.

Second. That the amount and sum in controversy, exclusive of costs, exceeds five hundred dollars.

Third. That the said defendant company at the times hereinafter stated was owning and operating within the limits of the State of Colorado a certain line or railway running in and through the counties of Weld and Boulder, in said State; that in addition thereto the said defendant company was also owning and operating a certain coal mine near the town of Erie, in the county of Weld, and which coal mine was immediately adjacent to the depot grounds of the said railway company at the said town of Erie; that in the working and operating of the said mine there has been deposited by the said railway company, through its agents and employés, and by the former owners and operators of the said mine a large quantity of coal slack along and close by the said railway track of the defendant; that the said slack had been dumped in such quantities as aforesaid along the line of the said railway company that the said slack pile extended up and down by the side of said track for several hundreds yards and was of a width, to wit, of from three to ten yards; that at some time unknown to plaintiff, but many months prior to the happening of the injuries hereinafter complained of, the said pile of coal slack caught fire and has burned continuously ever since; that at the happening of the injuries hereinafter complained of the said slack pile had so burned that a few inches beneath its surface there was a bed of burning coals

13 for nearly the whole extent of said slack pile, while upon the surface thereof were mere ashes covering the said bed of coals for a number of inches and concealing from the sight the fire

beneath; that from said fire, except in case of rain, snow, or wind, no smoke was emitted nor any evidence of its existence shown, and the whole mass, because of the covering with said ashes, appeared like a bed of dead and fireless ashes, and there were no indications that there was any danger whatsoever to be apprehended from walking upon or into the same; that the said slack pile, thus burned and appearing as aforesaid, was lying in a long and wide pit or trench that had been formed on the east side of the main railroad track in excavating and throwing up the dirt for said track; that the said bed of coals was far-reaching in depth, and cattle in crossing the same had sunk therein and burned before they could be extricated; that the said slack pile, burning in form and manner as aforesaid and covered and concealed as aforesaid, lay alongside of the main railway track of the defendant between the shaft-house on said coal mine and the depot building in the said town of Erie, and the burning portion thereof, concealed and covered as aforesaid, came within a few feet of the platform at said depot, so that passengers, in strolling around the depot grounds or passing to the side of the track, were liable at any moment to be engulfed in this concealed furnace; that the said slack pile, in the condition aforesaid, was upon the land of the defendant company and for a long time before the happening of the injuries hereinafter complained of the said defendant company had full knowledge of the existence of the same and of the fact that, except in case of rain, snow, or winds, it gave no indications of the existence of the said fire; that the said slack pile was in close proximity to the said town of Erie and within, to wit, a distance of two or three hundred yards of the
14 most populous part of said town; that the said town of Erie at the times aforesaid contained and now contains a population of from five to seven hundred people, a large percentage of whom are children, and many cattle feed upon the commons, and that the locality of the said slack pile was frequented by the adults and children living in and about and visiting the said town of Erie, as well as cattle, and that all this was done with the full consent of defendant; that the said defendant company had at the times aforesaid and hereinafter mentioned full knowledge of the condition of the said slack pile. It knew of the bed of burning coals beneath, and that the same was covered with the ashes aforesaid, and that except in case of rain, snow, or winds no indication was given of the presence of the fire therein. It knew that the same was in a locality frequented by the adults and children who lived in and about the town of Erie and those who might visit the said town and the cattle grazing thereabout, and that a person or beast ignorant of its condition was liable to go upon or into the same, unsuspecting any danger therefrom.

Fourth. That because of the public place wherein the said burning slack pile was and its locality being frequented by the adults and children of the said town of Erie and those visiting the same and the cattle grazing thereabout and because of the fire therein being concealed as aforesaid it became and was the duty of the said

defendant company long before and at the time of the happening of the injuries hereinafter complained of either to have extinguished the said fire or to have removed the same or to have fenced or enclosed the said slack pile or to have put some sufficient sign and warning notifying the public of the danger of going in or upon the same; yet the said defendant company, unmindful of its
15 duty in the premises, did at the time of the happening of the injuries hereinafter complained of and had for a long time before the happening of said injuries negligently and carelessly permitted the same to be and remain in the said public place and to be and remain without any sign or notice to the public of its dangerous character from the existence of the fire aforesaid and to be and remain in said public place without any enclosure or barrier of any sort or character to prevent unsuspecting adults or children from going in and upon the same or guards to turn away cattle, though it is true that since the plaintiff received the injuries hereinafter mentioned the defendant has enclosed the entire slack pile aforesaid with a good, substantial wire fence.

Fifth. That the plaintiff, David George McDonald, was upon, to wit, the third day of September, A. D. 1884, a child of not over twelve years of age; that he had just gone to said town of Erie and vicinity with his mother for the first time, and he was at the time of the happening of the injuries complained of wholly ignorant of the condition of said slack pile and was ignorant of the fact that it contained any fires whatsoever, and there were no signs to indicate to him or any one else that said fire existed therein, and there was no rain or wind on the day aforesaid, nor had there been for several days prior thereto, and there was none for several days thereafter, neither was there any snow or any other condition of the weather or any condition whatever that would indicate the presence of said fire either then or for several days prior thereto and thereafter.

Sixth. That at the date last mentioned the said plaintiff was in the neighborhood of the said depot and at or near the shaft of the mine of said company, and he was there by the permission and consent of the defendant and at defendant's request, and while there some boys who had been working on said mine and were in
16 the employment of defendant emerged from its shaft, and, seeing the plaintiff, the said boys, as if to frighten or injure the said plaintiff, ran after him, saying, "Let's grease him," and the said plaintiff, not knowing them and fearing and believing they might be seeking to injure him, started and ran from them and towards the said town of Erie, where his mother was, and in so doing he was compelled to run across the said slack pile of the said defendant company; that, for the reasons aforesaid, not suspecting or fearing or having cause to suspect or fear danger or fire from the said slack pile and what appeared to be but dead and lifeless ashes and which were nearly level with the surrounding surface of the ground from which he started, and being pursued by said boys, and without fault or neglect upon his part, he continued straight forward on a run towards the town of Erie, as aforesaid, and sought to cross the said slack pile; that when his feet touched the same

they sunk into it for some considerable distance, the same being soft and yielding, and because of his feet so sinking he, without fault upon his part, was thrown forward upon his hands and face into and upon the said slack pile; that upon being so thrown forward his hands and arms sank through the said ashes and into the bed of burning coals aforesaid, and his face was partly buried in the same, and thereby and because thereof his hands and arms and face were badly burned, and because thereof his hands and arms have become weakened and in part disabled, and his hands and arms and face were badly scarred and disfigured and his general health has been greatly and permanently impaired and his kidneys have become permanently weakened and diseased and he suffered great pain and torture and was confined to his bed thereby for a long period of time and was thereby disabled for a long time from the use of his hands in any way whatsoever.

Seventh. That because of the premises the plaintiff has
17 been damaged in the sum of fifteen thousand dollars.

Wherefore he demands judgment for fifteen thousand dollars and costs of suit and all other relief.

J. WARNER MILLS,
Att'y for Pl'tff.

STATE OF COLORADO,)
County of Arapahoe,) *ss:*

Mary E. McDonald, of lawful age, being first duly sworn, on her oath deposes and says she has been selected by the plaintiff as his next friend; that she has carefully read over the above and foregoing complaint; that she knows the contents thereof, and the same is true of her own knowledge.

MRS. MARY E. McDONALD.

Subscribed and sworn to before me August 3rd, 1888.

[SEAL.] W. H. WOLFERSBERGER,
Notary Public.

(Indorsed:) 1704. David Geo. McDonald *vs.* U. P. R'y Co. In U. S. cir. c't. Amended complaint. Original. Filed Aug. 3, 1888. William A. Willard, clerk. J. Warner Mills, att'y for pl't'ff.

And afterwards and on, to wit, the 16th day of August, A. D. 1888, came the said defendant, by Messrs. Teller & Orahood, its attorneys, and filed in said court and in said cause its demurrer to the amended complaint heretofore filed herein.

And the demurrer is in words and figures as follows, to wit:

Demurrer to Amended Complaint

18 In the Circuit Court of the United States, District of Colorado.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff.
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant in the above-entitled action and demurs to the amended complaint herein—

Because said complaint does not state facts sufficient to constitute a cause of action.

TELLER & ORAHOOD.
Attorneys for Defendant.

(Indorsed:) No. 1704. U. S. C. C. David George McDonald, by his next friend, &c., *vs.* The U. P. R'y Co. Demurrer to amended complaint. Filed Aug. 16, 1888. William A. Willard, clerk. Teller & Orahood, att'ys for def't.

And afterwards and on, to wit, the 19th day of February, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present; the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Demurrer to Amended Complaint Overruled.

DAVID GEORGE MCDONALD, by His Next Friend, MARY MCDONALD.
vs.
THE UNION PACIFIC RAILWAY COMPANY.
1704. Action for Damages.

At this day comes the said plaintiff, by J. W. Mills, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

19 And the demurrer to the amended complaint having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court now here that the said amended complaint is sufficient in law, and so the said demurrer is overruled.

And thereupon, on motion of the said plaintiff, it is ordered by the court that the said defendant answer within thirty (30) days from this day.

And afterwards and on, to wit, the 21st day of March, A. D. 1889, came the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its answer to amend- complaint heretofore filed herein.

And the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States, District of Colorado.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff, *vs.* THE UNION PACIFIC RAILWAY COMPANY, Defendant.	Answer to Amended Complaint.

Now comes the defendant in the above-entitled action and for answer to the amended complaint of plaintiff herein alleges—

That the defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether or not the said David George McDonald is a minor, nor as to whether or not the said Mary E. McDonald has been chosen and selected by him as his next friend, nor as to whether or not they or either of them are citizens of the State of Colorado, and therefore denies each and every of the allegations in said amended complaint in that behalf, and alleges that plaintiff is not entitled to have or maintain this action.

Denies that the defendant owned or was operating a certain coal mine near the town of Erie, in the county of Weld, adjacent to the depot grounds of said railway company, at the town of Erie, as in said complaint mentioned; denies that in working and operating the said mine there was deposited by the said railway company, through its agents and employés or otherwise, or by the former owners or operators of said mine a large quantity of coal slack or any quantity whatever along or close by the railway track of the defendant; denies that slack had been dumped along the line of said railway company, as in said complaint stated; denies that the said slack pile extended up and down said track for several hundred yards or any other distance, and denies that it was from the width of three (3) to ten (10) yards or any other width; denies that the said slack pile caught fire and has burned or burns continuously, as in said complaint stated, or otherwise; denies that at the time stated in said complaint the said slack pile had so burned that but a few inches beneath its surface there was a bed of burning coals, while the surface thereof was mere ashes covering said bed of coals and concealing from sight the fire beneath, as in said complaint stated, or otherwise; denies that if there was any fire that no smoke was emitted or any evidence of its existence shown, as stated in said complaint; denies that the same appeared like a bed of dead and fireless ashes; denies that there were no indications that there was no danger to be apprehended from walking upon or into the same; denies that there was such a slack pile burned, as stated in said complaint, lying in the ditch or trench on the east side of the railroad track, as stated in said complaint, or otherwise, and denies that animals had been sunk or burned therein; denies that said slack pile, burning in form and manner as stated in said com-

plaint, and covered and concealed, as stated in said complaint, came within a few feet of the platform of the depot at Erie, as stated in said complaint; denies that passengers were liable to be engulfed in a concealed furnace, as stated in said complaint, or otherwise.

Defendant, further answering, denies that said slack pile or any slack pile in the condition stated in said complaint, or in any other condition, was upon the lands of this defendant at the time of the injury complained of, or at any other time, as stated in said complaint, or otherwise, and denies that the defendant had full knowledge, or any knowledge whatever, of the existence of the same, or of the fact that, except in case of rain, snow, or winds, the same gave no indications of the existence of said fire, and denies that any fire existed upon the lands or premises of this defendant, as stated in said complaint; denies that said slack pile was in close proximity to the town of Erie or the most populous part thereof, as stated in said complaint.

Defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief as to the number of people in said town of Erie, nor as to the percentage of children in the same, nor as to the number of cattle that feed upon the commons, nor as to whether or not the locality described was frequented by children or adults living in or about or visiting said town of Erie, as in said complaint stated, and therefore denies each and every allegation of the complaint in that behalf; denies that any of the acts stated in said complaint were done with the consent or knowledge of defendant; denies that defendant had full knowledge
22 or any knowledge of the condition of said slack pile, as stated in said complaint; denies that it knew of the bed of burning coals beneath or that the same was covered with ashes, or that no indication was given of the presence of fire burning, or that it knew that the same was in a locality frequented by adults and children or visitors to said town of Erie or cattle grazing thereabouts, or that a person or beast ignorant of its condition was liable to go upon or into the same, as in said complaint stated or otherwise; denies that it was the duty of the defendant before or at the time of the happening of the injuries complained of to extinguish the said fire, or to have removed the same, or to have fenced or enclosed the said slack pile, or to have put a sign or warning notifying the public of the danger of going in or upon the same; denies that defendant was in any way or manner unmindful of its duty in the premises, or that it was in any way negligent or careless, as in said complaint stated or otherwise; denies that defendant negligently or carelessly permitted the same to be or to remain in said public place, as in said complaint stated; denies that said slack pile, if any there was, was without sign or notice or that it was without any inclosure or barrier, as in said complaint stated.

Defendant, further answering, alleges that it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to the age of plaintiff at the time alleged in said complaint, nor as to whether he had just gone to the town of Erie or vicinity

with his mother for the first time or otherwise, nor as to whether at the time of the happening of the injuries complained of he was ignorant of the condition of said slack pile or its condition as to fire or otherwise, or as to whether or not there was rain and wind
23 on the day mentioned or the days prior thereto, nor as to whether there was snow or any other condition of the weather that would indicate the presence of fire, as stated in said complaint or otherwise, and defendant therefore denies each and every of the allegations of said complaint in that behalf.

Defendant, further answering, alleges that it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether or not the plaintiff was in the neighborhood of said depot, as stated in said complaint; but denies that he was there by the permission or consent of the defendant, or at the defendant's request.

Defendant, further answering, alleges that it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether or not some boys frightened plaintiff, nor as to whether or not he started and ran from them, as stated in said complaint, or otherwise, nor as to whether or not he ran into a slack pile, nor as to whether or not he ran or sank into said slack pile or said fire, and therefore denies each and every allegation of the complaint in that behalf contained; and, on the contrary, alleges that if he did do so it was done through his own fault and want of care, and that if he was so injured it was not in or upon any lands or premises of defendants, or lands or premises under the care or control of defendant, and that defendant was in no way or manner liable or to blame therefor.

Defendant denies that such injury, if any there was, was caused by or through any act of defendant's employés, and denies that it was caused by or through any act of defendant's employés or any of them while in the discharge of any duty of said employés to the defendant; and defendant alleges that if there were any such acts that it is not in any way or manner responsible therefor.

II.

Defendant, further answering, alleges that any injury that
24 may have been received by the plaintiff, as in said complaint alleged, was caused by and through his own negligence, default, and want of care, and the negligence, default, and want of care of the mother of said plaintiff, and not by and through any act, default, or negligence on the part of defendant.

Wherefore defendant prays to be dismissed and to recover its costs in this behalf expended.

TELLER & ORAHOOD,
Attorneys for Defendant.

STATE OF COLORADO,)
County of Arapahoe,) ss:

Harper M. Orahood, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the defendant making

answer in the above-entitled action; that said defendant is a corporation, and for that reason affiant makes this verification in its behalf; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true to the best knowledge and belief of affiant.

HARPER M. ORAHOOD.

Subscribed and sworn to before me this 21st day of March, 1889.
[SEAL.] C. H. SPERRY,
Notary Public.

My commission expires January 25th, 1892.

(Indorsed:) 1704. United States circuit court. David George McDonald, by his next friend, Mary E. McDonald, *vs.* The Union Pacific Railway Company. Answer to amended complaint. Filed Mar. 21, 1889. William A. Willard, clerk. Teller & Orahood, att'ys for def't.

25 And afterwards and on, to wit, the 29th day of March, A. D. 1889, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his replication to the answer heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

Replication.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss.:*

In the Circuit Court of the United States in and for said District.

DAVID GEORGE McDONALD, by His Next Friend, MARY E. McDONALD, Plaintiff, *vs.* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 1704.

Replication.

For replication to the second defense in the answer herein contained, plaintiff denies that any injury whatever received by plaintiff of which he complains in his complaint was caused in any manner or to any extent by or through his own negligence, default, or want of care or the negligence, default, or want of care of his mother, and alleges that all said injuries were received wholly by or through the act, default, and negligence of the said defendant.

Wherefore, the premises considered, plaintiff prays for the relief and damages heretofore prayed by him.

J. WARNER MILLS,
Att'y for Pl'ff, 53 & 54 Patterson & Thomas Blk, Denver, Colo.

26 STATE OF COLORADO, } ss.
County of Arapahoe, }

Mary E. McDonald, of lawful age, being first duly sworn, on her oath deposes and says she has been selected by the plaintiff as his next friend: that she has carefully read over the above and foregoing replication: that she knows the contents thereof, and the same is true of her own knowledge.

MRS. MARY E. McDONALD.

Subscribed and sworn to before me March 27th, 1889.

[SEAL.] W. J. WEEBER,
Notary Public.

(Indorsed:) 1704. Circuit court U. S. David George McDonald *vs.* The Union Pacific R'y Co. Replication. Filed May 29, 1889. William A. Willard, clerk. J. W. Mills, att'y for pl'ff.

And afterwards and on, to wit, the 27th day of May, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Commenced.

DAVID GEORGE McDONALD, by His Next Friend, MARY E. McDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704.	Action for Damages.

At this day comes the said plaintiff, by J. W. Mills, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

27 And thereupon comes a jury, to wit, Charles Basye, Nicholas Ennis, V. Devinney, Joshua S. Losher, F. C. Jones, H. W. Hallett, J. R. Rawatt, J. C. Dedisse, James E. Kirk, William Kimball, H. H. Suttle, William Babcock, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence: and thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor listen to such conversation of others, are permitted to retire, to meet the court at its next incoming.

And afterwards and on, to wit, the 28th day of May, A. D. 1890, the same being one of the regular juridical days of the May term,

A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Continued: Verdict.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, *vs.* THE UNION PACIFIC RAILROAD COMPANY.	1704.	Action for Damages.

At this day come again the said parties, by their attorneys, respectively; and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn baliff to consider of their verdict.

28 And afterwards and on this day come again the said jurors, and on their oaths do say they find for the plaintiff and assess damages in the sum of twenty-five hundred dollars.

And afterwards and on, to wit, the 12th day of July, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Granted.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704.	Action for Damages.

At this day comes the said plaintiff, by J. W. Mills, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the motion of the said defendant for a new trial herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be granted, and that a new trial of the issues herein joined be had, conditioned, nevertheless, that the said defendant pay the costs of this term herein, to be taxed.

And afterwards and on, to wit, the 12th day of December, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

29 *Order: Leave to Amend Amended Complaint.*

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY. } 1704. Action for Damages.

At this day comes the said plaintiff, by J. W. Mills, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And thereupon, on motion of the said plaintiff, it is ordered by the court that he have leave to amend his amended complaint herein.

And it is further ordered that the said defendant's answer shall stand as an answer to said amended complaint as amended.

And afterwards and on, to wit, the 12th day of December, A. D. 1889, came again the said plaintiff, by J. Warner Mills, his attorney aforesaid, and filed in said court and in said cause his amendment to amended complaint heretofore filed herein.

And the amendment to the amended complaint is in words and figures as follows, to wit:

Amendment to Amended Complaint.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States in and for said District.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff, *vs.* THE UNION PACIFIC RAILWAY COMPANY, Defendant.

It is hereby ordered by the court, upon application of plaintiff, as follows, to wit:

30 That the amended complaint filed herein be, and the same is hereby, amended by interlineation as follows:

In paragraph third, on page two, between the words "ten yards" and the word "that," these words shall be inserted, to wit, "and the said coal slack was not spread out in thin layers on the ground, but was taken out of the said mine, operated as aforesaid by the defendant, and piled upon the surface of the ground in such quantities as to produce spontaneous combustion."

And on the same page in said paragraph, in place of the word "caught," these words shall be inserted, to wit, "by spontaneous combustion took."

And on page four *of* said paragraph, between the words "slack pile" and the word "it," these words shall be inserted, to wit, "it

knew that the said coal slack so piled as aforesaid upon the surface of the ground was in such quantities, as aforesaid, as to produce spontaneous combustion."

And on page four, in the first line of the fourth paragraph of said amended complaint, in the place of the word "that," the following words shall be inserted, to wit, "that because of the liability of said slack pile to spontaneous combustion, and."

And it is further ordered that each and every of the allegations of the said amended complaint as the same are hereinabove amended or to be amended shall be considered as specifically denied by the said defendant as so amended.

Dated this — day of November, A. D. 1889.

J. Warner Mills, attorney for plaintiff: —— ——, attorneys for defendants.

31 (Indorsed:) 1704. United States of Am. Circuit c't. Dist. of Colo. David George McDonald, by his next friend, Mary E. McDonald, pl'ff, *vs.* The U. P. R'y Co., def't. Amendment to amended complaint. Filed Dec. 12, 1889. William A. Willard, clerk. J. Warner Mills, pl'ff's att'y.

And afterwards and on, to wit, the 16th day of June, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Henry C. Caldwell, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Commenced.

David George McDonald, by His Next Friend, Mary McDonald, *vs.* The Union Pacific Railway Company.	1704. Action for Damages.

At this day comes the said plaintiff, by J. W. Mills, Esq., her attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And thereupon comes a jury, to wit, J. B. Girard, Edward H. Clowminzer, James Cairns, Gavin Leslie, George M. Howard, W. M. McMichen, C. I. Caldwell, J. A. Baker, D. F. Peterson, Charles E. Moretina, Samuel Raugh, E. R. Barkley, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching
32 this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire, to meet the court at its next incoming.

And afterwards and on, to wit, the 17th day of June, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Henry C. Caldwell, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Continued.

DAVID GEORGE McDONALD, by His Next Friend, MARY E. McDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704.	Action for Damages.

At this day come again the said parties, by their attorneys, respectively; and the said jurors being now here present and in the jury-box, the hearing of the evidence is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire, to meet the court at its next incoming.

And afterwards and on, to wit, the 18th day of June, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Henry C. Caldwell, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial Continued: Verdict.

33	DAVID GEORGE McDONALD, by His Next Friend, MARY McDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704.	Action for Damages.

At this day come again the said parties, by their attorneys, respectively; and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors, having heard all the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on this day come again the said jurors and on their oaths do say they find for the plaintiff and assess the damages at seven thousand five hundred dollars ($7,500.00).

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury in favor of the said plaintiff and against the said defendant for the said sum of seven thousand five hundred dollars ($7,500.00) and the said plaintiff's costs, to be taxed.

And thereupon and on the same day, to wit, the 18th day of June, A. D. 1890, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court, in words and figures as follows, to wit:

Judgment.

DAVID GEORGE MCDONALD, by His Next Friend, MARY MCDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704. Action for Damages.

On this 18th day of June, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court, there being present the Honorable Henry C. Caldwell, circuit judge—

It is considered by the court that the said plaintiff do
34 have and recover of and from the said defendant seven thousand five hundred dollars ($7,500.00), his damages by occasion of the premises in his complaint mentioned in form aforesaid assessed, and his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 26th day of June, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Henry C. Caldwell, circuit judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Denied.

DAVID GEORGE MCDONALD, by His Next Friend, MARY MCDONALD, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	1704. Action for Damages.

At this day comes the said plaintiff, by J. W. Mills, Esq., his attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the motion of the said defendant for a new trial of the issues herein joined having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court for good and sufficient reasons to the court appearing that the said motion be denied.

And thereupon, on motion of the said defendant, day until thirty (30) days from this day is allowed it within which *time* to file a bill of the exceptions reserved by it upon the trial of the issues herein joined; and supersedeas bond upon writ of error is hereby fixed at ten thousand dollars.

35 And afterwards and on, to wit, the 2nd day of July, A. D. 1890, came again the said defendant, by its attorneys afore-

said, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, District of Colorado.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Be it remembered that heretofore, to wit, on the 16th day of June, 1890, being one of the regular juridical days of the May term, 1890, of said court, the above-entitled cause was brought on for hearing before the Honorable H. C. Caldwell, circuit judge, and a jury. Thereupon said plaintiff, to maintain the issues on his behalf, introduced as a witness Mrs. Mary E. McDonald, who, being duly sworn, gave evidence tending to show that she was the plaintiff in the case and the mother of George McDonald; that on September 3rd, 1884, she arrived at Erie, Boulder county, Colorado, and stopped at a hotel kept by R. J. Van Valkenburg, and also that the said George McDonald was at that time about 12 years 8 months old, his twelfth birthday occurring on the 16th of January preceding; that the boy, George, announced his intention to visit the coal mine of the defendant, to which the witness finally consented;
36 that this was immediately after dinner, and that a short time afterwards he returned, or was brought back to the hotel by parties carrying him, he having been burned; that a physician, Dr. Friedman, was called and his clothes were cut off. The skin & flesh were hanging; flesh and skin from his hands *the* nails were burned. I had been putting on soda and water up to the time the doctor came, perhaps ten or fifteen minutes. His arms were burned, the skin and flesh hanging off his hands and arms. There were also burns on his forehead—forehead burned and bleeding down to his nose and mouth. His neck was burned; not so badly, though. His legs and feet were burned. He had on heavy new shoes, calf-skin, and they were burned around the ankles. He did not have any hat on. His coat was burned on the sleeves and the back burned over, more or less; it was burned through on his elbow more than any place. His pants were burned in little holes all over. Three or four young men brought him to the hotel; carried him. We got the company's doctor; Mr. Freeman was the only doctor in town, and he at once cut George's clothes off and done up his hands and arms with linseed oil and rye flour and put him under opiates the first thing he did; he seemed not to be conscious during all the time I was putting it on and screamed. He did not have any fever that day; the day following through the night he was unconscious and feverish; he had fever more than that night; it came and went the following day, about the same time he was burned; I sent for

the doctor; he gave him quinine and opiates. He had fever all through the night and up to the time I came down to Denver. During the fever he was unconscious part of the time; he would talk in his sleep and scream; was frightened; he seemed to suffer very much. I returned to Denver Friday morning; left Erie about 11 o'clock; George was not able to walk then.

37 The trouble was he began to be feverish and restless about the time the doctor usually came—I think, about noon or half past eleven and I became alarmed—and sent for the doctor. He was out of his head. His hands and arms were swollen so much I thought he was blood-poisoned—I didn't know. His arms swelled about twice the natural size up to his shoulders; he screamed every now and then with pain. The doctor came over at twelve o'clock—said he would amputate his right hand. I said, If it is done it must be done in Denver. The doctor went away. I wrapped George up, took him to the train, and brought him to Denver; took him to my house, where I had medical treatment for him immediately. I went right to Dr. Smythe's office. He gave him an opiate; told me to take him right away to our rooms and take all the waste oil off his hands. We had to hold his hands up; as soon as we put them in the natural position he would scream. The doctor came right up and used carbolated vaseline and lint and I got some silk oil sacks to put his hands in. Dr. Smythe treated him between two or three weeks; then George went to his office a good many times. He was confined to his bed about three weeks. His condition as to suffering while he was in bed was restless, nervous and weak; had no appetite. He suffered a great deal of pain. The wounds where the deepest burns were turned into running sores. They were on this part of his right hand and both of his wrists and both elbows. They were running sores for three or four months. Before the accident he was a very robust boy, from his birth. I have a picture of him about the time of the accident; one was taken at the age of five and one a month or six weeks before he was burned; one was taken just a few weeks before the accident.

The COURT: What is the objection to that going to the jury?

38 DEFENDANT'S ATTORNEY: My objection is you cannot tell anything by a picture of a boy of thirteen whether he is in good health or not, or whether he has enjoyed good health. He may have been in good health at that time and may have been sickly all the rest of his days. The evidence is not competent.

Objection overruled as to the photograph taken a few weeks before the injury if you supplement with testimony that that is a true photograph.

To the admission of which defendant, by its attorney, then and there excepted.

Q. Is this a good picture of him at that time?
A. It is.
Q. How long before was this taken?

A. In the summer, about four or five weeks, I think; about five weeks before he was burned.

Q. How did he look at the time of the injury as compared with the way he looked at the time this picture was taken?

Objected to as incompetent. Objection overruled. Exception.

A. He was well and in very good health; he looked well.

The COURT: Had there been any change in his appearance between the taking of that picture and the day of the injury?

A. If anything, he looked better, because we had been out in the mountains purposely to give him a little recreation.

The said photograph was here admitted in evidence.

Q. Did any troubles set in immediately following this accident other than what you have named now? If so, state what they were.

A. Yes; he was troubled with nervousness.

Q. How did that affect him? Just give it in detail.

A. He would scream in his sleep; he was restless and would scream in his sleep, wake up, and stay awake for two or three hours at night.

Q. How long did that continue with him?

39 A. Nearly all the first year after he was burned.

Q. How has that sympton been in later years?

A. He does not scream any more in his sleep that I know of, but it was some time before that went away from him; he don't scream.

Q. Did he ever have such a sympton prior to this accident?

A. Never; no; he always slept well and had a fair appetite.

Q. Did he have any other trouble?

A. Yes, sir; he had urinary trouble.

Q. Did he have any trouble with his eyes of any sort?

A. Yes, sir; he had a nervous twitching of his eyes, which greatly impaired his eyesight, so much so that I took him to several oculists. He has had nervous twitching of the eyes ever since he was burned; he is better now; he never had anything of that kind before he was burned. His eyes are very weak; he had none of that sort of weakness before this accident. His wrists were very weak; I could see it manifested in his playing or in his lifting or work; he had no use of one of his fingers. His general health since the accident has been entirely impaired. He has never had dyptheria, small-pox, yellow fever, spinal meningitis, or anything of that sort. Sept. 3rd, 1884, was a nice, warm day—calm; no wind. I never knew or heard anything about this burning slack pile until after this accident.

On cross-examination the witness testified that she did not know Dr. Freeman; said she had heard him called—except what she had heard in the hotel, and that she knew nothing about his being the company's or defendant's doctor; that she did not know where Dr. Freeman was, and that she had taken pains to ascertain, but could not find him; that the boy was in bed all the time for the first two

weeks after his arrival at Denver. He had running sores for some months after he got out of bed; had Dr. Smythe employed two or three weeks. The running sores on his elbow and his hands must have been for upwards of two months after Dr. Smythe was discharged; that George went to the doctor's office and showed him his sores; that she could not remember how many times he went, but he went to tell the doctor how his hands were and ask him if there was anything more necessary to be done. The hands were not wholly healed over or the skin grown over until the spring after the accident; that he did not come at that time to be treated for those sores; that they had no other doctor than Dr. Smythe, and that the doctor gave him some medicine for his urinary troubles, and then said he need not give him any more for that. The treatment for the burns was vaseline and cotton—washing with hot water; that in visiting the coal mine George had no business, excepting to amuse himself; that she had no other doctor than Smythe and Freeman; that these burns were painful, but when he fell asleep he would try to put his right hand above his head because it was more painful when in the natural position—the blood would run down into it; but the doctor did not treat him for the burns on the feet because they were not severe. The treatment for the forehead was vaseline. The forehead did not call for any particular treatment; it was not so deep a burn; but the skin hung from his eyes for the first few days. The severest burns were on his right hand, and both of his wrists in front, and both of his elbows, and quite a deep burn on the right arm.

40

On redirect examination the witness stated that the feet were blistered, but did not come to any running sores.

Plaintiff also introduced as a witness R. J. VAN VALKENBURG, who gave evidence tending to show that at the time of the accident he was residing in Erie and kept a hotel, and that he is acquainted with the coal shaft of the defendant, which he thinks is on the northeast quarter of section eighteen (18), township one (1), range sixty-eight (68) west. It is about 500 or 600 feet from the town of Erie and known as the Boulder Valley shaft and mine, and operated by the Union Pacific Railroad Company at that time, and that it had been operating it for some two years prior to that time and operated it continuously up to the time of the accident; that he saw the boy, George McDonald, when he was brought into witness' hotel after being burned; some men carried him into the house and placed him on a lounge or bed; that he was all covered with ashes and his clothing and his sleeves and hands were burned and his shoes were crisp, and he appeared to be suffering a good deal; also had a burn on the side of his neck and face; the boy remained there *there* about three days; the Dr. Freeman spoken of by the former witness was not called as the defendant's physician at the time; he was simply called in the capacity of a physician to attend to the injured boy. The witness also stated that he had made a diagram of the place where the accident happened—the coal shaft, trench, &c.—which diagram is hereto attached.

41

The witness also stated that the dump pile at the shaft was probably 16 feet high; the shaft-house was 16 feet high where they hoisted coal up and dumped it over to get it on the cars. The weigh office was 16 feet above the ground and cars were run out from it and the coal was thrown into shutes and screened into different cars standing on the side track below; that from the town there was a bridge crossing over the creek and from there a pathway crossing over the tracks and up to the shaft, making an irregular path around the west pile up to the shaft; that the part stained red on the diagram indicated the fire; that the place between the two tracks—that is, between the main track and the switch track, as shown in the diagram—is the place where the
42 *the* company dumped fine coal slack, which took fire by spontaneous combustion, which fire reached down to within a short distance of the depot, and from the point opposite where the boy fell in down to the depot was 498 feet and about 68 feet across where the fire was. There was a pile of rock and shale that had been taken out of the coal shaft and it was piled about 16 feet high above the surrounding ground and some feet west of the shaft, between the side tracks and the main track; that the foot-path which ran around the said west pile and over the tracks was about 18 inches to two feet wide; that the fire was covered over with ashes because the ashes had settled on top. When the wind blew, the fire would blaze up, and when it rained or snowed you could see steam; but, as a rule, the fire did not show at all; that the dump on the west pile, 16 feet high, spoken of, was rock and shale and did not burn (this west pile is marked "pile" on the map), but the fine coal that was dumped by the company always took fire after a certain time, and this path was just a narrow one a little bit above the fire—sort of a rim running around the fire, about 18 inches wide. The day on which the accident happened was a clear, calm day—no wind, rain, or snow. There was no fence around the slack pile nor any guard of any kind—entirely open, and no placards of any sort warning a person of danger; no persons to guard the premises. The pile had been burning there a long time—two years, probably—before the accident happened, and always burning in the way in which he had spoken of it, except when the wind blew or there was snow or rain; that at times the company would put more coal on and then it would burn on top at the surface and there would then be fire on top; that the defendant did not dump all their fine coal there, but a portion of it was carried further down and dumped in another place, and
43 that in that place it was also burning; that the witness had known of cattle getting in and being burned more than a year before the boy was burned, and that the agents of the defendant knew this fact. The miners' children were accustomed to go over there just as they pleased, and went there frequently; twenty or more there a day went over near the shaft. Children were allowed to go and pick up and carry home coal. Anybody was allowed to go there, and children were never ordered away or prohibited from going there to the knowledge of witness. They

were always accustomed to go over there since the mine was worked. The population was at that time, say 600, and most of this 600 had families, the children being of various ages. Witness drew the map, marked Exhibit "A," himself, and it is accurate. He made all the figures and measurements on said map himself, and they are correct. His hotel is in the town of Erie, and it is only five or six hundred feet from his hotel to the said coal shaft. The relative situation of the shaft, 16-foot pile, fire depot, main track and side tracks, town and path, creek and bridge between hotel and shaft, shaft-houses, road, &c., is correct as shown on the map.

(Here follows map marked p. 43*a*.)

On cross-examination the witness gave evidence tending to show that there were two roads by which he could go from the hotel to the shaft—one over the bridge and one by crossing up on the east side of the track, and that the slack pile is there still, but that the fire has burned out; that the path is probably 18 inches above the slack pile where the boy stepped off; that the defendant had been working the coal mine for probably three years, and had been in the habit of dumping their fine coal in this place where the boy fell in and the other place for probably two or three years, and it had been burning for about two years. During that time
44 witness did not know of any accident happening to children, men, or women except this one; that fine coal when taken up or thrown down would take fire by spontaneous combustion, and that in operating the mine, the defendant, for the purpose of getting rid of the fine coal, continued to burn it up by throwing it in the slack pile; that he is acquainted with other mines around the country, and that in all the coal mines *in* which he had any acquaintance they dumped their slack on the surface of the ground and let it burn, and that in those cases it would not be down like this between two railroad tracks, but upon a level.

Herewith witness was interrogated at some length as to who were operating the mine at the time of the accident, but it was afterwards stated and is here admitted that it was being operated by the Union Pacific Railway Company.

On redirect examination: That their regular path which would be travelled in going and coming from the shaft was the one pointed out by him on his diagram near to the place where the boy fell in, and as to the slack pile of other coal mines, that the difference would be that in other mines you would have to walk up onto it, and in this place you would step down into it, and that there were other coal mines within a mile of this, but no other coal mine as near to the town of Erie, nor within a mile of said town.

And also the plaintiff introduced Mrs. R. J. Van Valkenburg as a witness, who gave evidence tending to show that she was the wife of R. J. Van Valkenburg, and was at the time of the accident, and that she should think that the boy was delirious from the

screams and fuss he made; that his hands and arms were badly burned and his clothes were burned.

45 On cross-examination she stated that she did not pay much attention to it; had other duties to perform about the hotel; only knew he was badly burned and screaming at the top of his voice, and was at their house three days.

Plaintiff further called WILLIAM FRANCIS, who gave evidence tending to show that he was a coal miner, and had worked at this mine, and that, as a rule, they hauled the slack, the fine coal, away and dumped it on the prairie or elsewhere, and that in all such cases when a large amount was piled up it would take fire; that the defendant's shaft was on the side of a hill, and that below that there was a trench made by throwing up the dirt for the railroad tracks, and that the slack and fine coal from the Boulder Valley mine to the side of the tracks between the two tracks, and that the coal and slack was thrown out and deposited between these two tracks, and that men, women, and children came there & were in the habit of coming there to see the mine operated; they had drifts and galleries hundreds of feet in length; that he had been working on the mine 16 years. This slack pile had been there at the side of the track. The path spoken of by the other witnesses ran close to it—almost touched it—the burning slack pile being 18 or 20 inches in width. Stones were sticking up here and there in the path, and it was not level, but slanted toward the fire: that the coal slack was all on fire all over the pile, burning from the bottom on up through; ashes show on top of it, and that the fire could not be seen. It was burning on through, and had been burning; it was red hot on top of the slack; was fire clay and slate and ashes, white and red ashes, and that you could not see smoke except when the wind blew or there was rain or snow, but the ashes covered

46 up the fire. He had frequently, nearly every day, seen children play around there, and they were allowed to go around the machinery where the shaft was, and this was allowed during all the years this mine was operated. Defendant had an engine, boiler, and a cage; that the coal was put in cars, caged, and hoisted up by machinery and carried up to the level of the west dump, which was 18 or 20 feet above the surface; that there there was a sort of a trestle-work and a weighing machine 20 feet above the surface where it was weighed and dumped into the railroad cars by schutes, the cars being down on a level under the schute. There was 80 feet underground workings—had drifts and galleries 700 or 800 feet off—very extensive workings: that during the time he worked there he never heard of any objections to children coming on the premises or of their being driven off; that of the two tracks, one was a main track, going from Erie to Boulder, and the other one was a switch, and that by the raising of the tracks it was formed into what was called a trench, into which the coal was dumped.

Witness was further examined in respect to the map or diagram furnished by Mr. Van Valkenburg & verified the same, but there was

no question made upon that as to the correctness of the diagram. All that evidence was omitted, and the said map was duly admitted as evidence and is hereto attached & marked Exhibit "A."

The witness also stated on redirect examination that the fire had been burning there for years quite close to the top, and the only travelled path he knew was the one marked on the diagram; was the one by which the miners generally went to their work; that the door to the shaft-house is on the west side of the engine-house.

On cross-examination he stated that the pile had been
47 burning for years, and the company's method of getting rid of their waste and fine coal was by taking it in that place and letting it burn; that he worked there at that shaft three, four, or five years; that he never knew of any other child or person having been burned; that the path was a pretty rough path, about on a level with the ashes of the burning slack pile, but the path was of different stuff than the slack pile.

Plaintiff also swore as a witness JAMES MORRISON, who gave evidence tending to show that he was working in this coal shaft in 1884, and had been acquainted with it a good many years before and after.

Question. "During the time that you were there, tell what you know of strangers, men, women, or children, being allowed about the mine—going about there."

Answer. "Well, in general, strangers coming to the town, about the first look they take is over to the mine & engine; they are so near the town, and for curiosity they often walk over;" never heard of anybody, children or others, being driving away from the works; that the slack pile was covered with ashes and that the fire could not be seen; the path was about 18 inches wide and near the level of the trench; it was rough and slanting down toward the fire; the fire in 1884 was burning within 20 feet of the depot.

On cross-examination the witness stated that the pile had been burning in that way in that place for about two or three years, and that the path above it could not be easily seen; that while you could undoubtedly see it, still a person could not follow it clearly, plainly & easily, and ladies going to the graveyard would avoid it and did not want to travel it; when on the path the heat from
48 the burning slack could be felt only when the wind blew; that the defendants used to dump their fine slack in there from time to time and burn it, and continued to burn it in that way.

Plaintiff also introduced J. W. MAKIN. He gave evidence tending to show that he was working for defendant at the mine in September, 1884; that it was a nice, calm day; that witness started for his home and he heard some one crying out and he saw the boy come running and saw him step over into the fire; that some trappers had scared him and he was running for home and fell over into the fire. These trappers were boys down in the mine for

the purpose of leading the mules. The boy, George McDonald, was running in the direction of the path that led to the town. He ran into the fire and fell onto his hands and face. He (witness) was standing about four feet off from him in the foot-path. He went in and pulled him out and found his hands all burned, skin hanging from the hands and fingers, and was burned in his back and clothes; that he helped carry him to the hotel, the boy not being able to walk; that at the time of the accident there was nothing to indicate that there was any fire there; that a man who had never seen it would walk right in it; would not know there was any fire; nothing but brown ashes; came up within forty feet of the depot. Children used to go around there at all hours of the day; some to get coal, others to bring their fathers' dinner, and some would go over just to see the place, and this condition of affairs was so allowed or conducted during all the time witness was there; that the path was up and down and on a slant toward the slack pile. The Jackson, Marfell & Mitchell mines used to throw their slack out, but they used to scatter it so it would not burn.

49 On cross-examination the same witness stated that it was a plainly-defined path and was used by the miners in going to and from town to the shaft. There was no other path; that when the boy fell he was running toward the town; that he had not at that time quite arrived at the path; he was running across the tracks; he was making for the path and running across—took a short cut for the path and fell into the fire. He had never known any of the children or persons who belonged there to fall in there before; he had worked on and off at the mine since 1873. The slack pile had been burning there in that way for about two or three years, and that was the company's method of getting rid of their slack, throwing it in that place, between the tracks and the switch and letting it burn.

He heard the trapper boys screaming to scare George McDonald when he was running from them.

The plaintiff, further to maintain the issues on his behalf, called as a witness GEORGE MCDONALD, who, being duly sworn, testified as follows:

Direct examination by Mr. MILLS:

Q. State your name and your age, George.

A. My name is George McDonald. I was 18 the 16th day of January, 1890.

Q. Were you ever in the town of Erie?

A. Yes, sir.

Q. In Weld county, Colorado? When?

A. About September 3rd, 1884.

Q. Were you ever there before?

A. No, sir.

Q. Did you go to the shaft-house on the Boulder Valley coal mine?

A. Yes, sir; I went there in the afternoon.

Q. Did you go there more than once?

A. No, sir; I did not.

Q. What time in the afternoon was it you went there?

—. Well, I can best explain if you just let me tell what occurred in the morning. When we got there, about half past 9
50 o'clock in the morning, mother went to the hotel room, parlour, dark parlour. I went out with a boy who lived next door. He said he was a trapper. He was going with his dogs, he said, up the creek to meet some other boys. So I said I would go along with him. We went up. We had been gone about an hour and a half. When we got back we met some other boys away up by a frame house.

Q. Did you go to the coal mine on that trip?

A. No, sir; I came back to dinner. He said he worked up there and was going up at one o'clock to relieve the other fellow, so when I was at dinner I asked my mother if I could go. She said I could not at first, but finally let me go; told me to be careful. So I went up there and the trapper—I followed him up. He went around the hill and I saw where he went around. I did not go that way. I walked up the railroad track. There was a switch up at that end of it.

Q. Point out on the map the way you went up.

A. Well, when we came across the bridge here we took around somewhere here (indicating). He went up that way. I went up this switch and came down here; man with three freight cars standing on the track. He had a crow-bar.

Q. You came up this way—walked on the switch?

A. He was trying to shove one of them out. He had a crow-bar and put it under the car and could not start it. At last he threw the crow-bar away and got down and tried to push it, and could not. He saw me and says: "Kid, give me a lift" or a "push." I forget which it was. So I walked up and pushed; got it started. Right there was a little bit more, where you had to push it up on the other side where it went down under the shaft. When he got it down there he jumped up on top of the car and braked it under the coal chute and then stopped it. That is where he stopped the car. He told me he thanked me. Then he went out and got another
51 little car; pushed it a little bit; could push it up. Well, he went down. I went upstairs.

Q. What do you mean by going upstairs?

A. The place away up above where they were pushing out coal, sliding it down into these cars, about 12, 16, or 18 feet high. I went up there. I don't know which side the door was on; somehow I got up there—standing around; he had some empty cars loading on the track, on a little bit of thing, pushing and came around and told me to get out of the way of the cars, so I got off the track; walked around there for about ten minutes. After I looked down the shaft and then at last I walked down; they didn't say nothing, except this fellow said to get out of the road of the cars. Then I went down-stairs and walked around and pretty soon the fellow came along with a pair of mules and was driving them up. I asked

him what he was going to do; he told me he was going to put them down the shaft. I walked up pretty near the shaft; when the thing came up he put them on the shaft and they went down. I turned around, walked back, was standing—anyhow, I heard some yelling and laughing; I turned and all of a sudden I seen five or six boys, all coming out. They had little lamps on their hats, their faces were dirty, and one of them yelled, "Let's grease him:" one yelled, "Let's burn him," and started for me. I started to run; I ran around these tracks and seen persons standing on the bank like it was. I went to go past him, and just as I went to go here something slipped. I went down on my head and face; I tried to get out and put my hands down; I was sinking—all of a sudden I was about smothered to death and somebody pulled me out, got me up; I could not hear or see.

Q. What was the trouble?

A. The ashes were all in my mouth, ears, and eyes; ashes and fire, so I got up and they brushed it out. He wanted to take and walk me, so I think it was two men—I don't know—picked me up; it was one; when we got to the creek I wanted to jump over;
52 he would not let me: that is all I remember from the creek on to the hotel.

Q. What is your next remembrance about what occurred?

A. The next remembrance is where somebody was cutting up the sleeves of my coat.

Q. Where was that?

A. At the hotel.

Q. What was the occasion of that?

A. I don't know. I heard somebody say, "You better wash that off," or do something. I don't know what he did say. Then got the scissor and cut off my coat.

Q. What was your condition as to burns and bruises?

A. When I got a chance to know how things were, to brush my eyes out, my ears, and face, they were all burned: ashes all down my throat and up my nose; and when he brushed my face off the blood was running in my mouth from off my forehead, in my eyes; my hands were all sore; I don't know how they were; in fact, I was smar-ing all over.

Q. Did you have any burns on your neck or ears?

A. Yes, sir; I say had burns all over my neck, right down here on my breast.

Q. How did that come?

A. I suppose when the stuff got down in there.

Q. Places where there were burns?

A. Yes, sir; my hands, arms, face, neck, my feet, on my knees.

Q. What was the condition of your clothing?

A. The right-hand sleeve was burned, I suppose, where I was trying to dig out. I struck my hand, burned all the coat and vest, all burned in front; my legs, pants all full of holes; my hat, I don't know what became of it.

Q. Do you know—have you any idea, what is your best judg-

ment of the length of time you were in before assistance came for you?

A. I don't know; about two minutes; perhaps less; it seemed like two hours to me.

Q. Were you able to walk?

53 A. No, sir; I could not put my feet down; they smarted so.

Q. What was the matter with your feet?

A. They were burned, swollen, blistered.

Q. How were your arms?

A. My right arm, I could not pick it up or use it; put it down there it was just all like it was on fire; it was just like it was dead.

Q. You could not pick it up if you tried?

A. I could not lift it at all.

Q. Can you tell the jury what was the extent of your suffering or the character of your burns, as being mild or severe or otherwise?

A. They were not mild, because I would not want to jump in the creek to get cooled off. They were so bad I either fainted or something else, because I did not know a thing from the bridge to the hotel. From the slack pile to the bridge I was hooping and yelling.

Q. Were you yelling just from your burns?

A. Yes, sir.

Q. Do you remember whether you had any fever that came on about when?

A. I know every afternoon after that, from the time I stayed up there, I generally had some kind of thing to take me off to sleep.

Q. Did you have a doctor up there?

A. Well, yes, sir. The only remembrance I have of him I was lying in the room and he came in and said something about sawing off my hand. I heard my mother; she began to argue with him. I don't know what occurred then.

Q. When did you go to Denver?

A. That I don't know.

Q. You came to Denver and received medical treatment?

A. Well, I had been there three days; at least, Mr. Reed, the person that was with us, said it was; showed my mother.

Q. What doctor attended you here in Denver?

A. Dr. Smythe.

Q. Tell what you suffered immediately following these

54 burns and what and in what way you suffered.

A. Well, for a long time I could not go to sleep unless my hands were held up above my head, because when they would get down by my side they would make me feel so bad I could not go to sleep; I could not lift them up so they just had to hold them up above my head so I could go to sleep; hold them above my head; keep them on a pillow or somebody hold them.

Q. Did you sleep well?

A. No; I would wake up all of a sudden and would think I was going into that pit again.

Q. How long did that continue?

A. I suppose about two weeks. I don't know.

Q. Were you ever troubled with wakefulness after the two weeks?

A. I just had had got to put my hands in a certain position to go to sleep. If I did not they would get like they were dead. When I lifted them up it would feel like sticking pins in them; I would have to either lay on them or put them above my head, one or the other, to go to sleep.

Q. Immediately following coming down, say six or seven months after this occurred, how were you sleeping then?

A. It would be just the same condition; it has been that way all the time. I don't sleep very good now, and if my hands get down by my side, if I roll upon it it wakes me up immediately and I cannot get to sleep again.

Q. Did you have any other trouble?

A. Yes, sir.

Q. What was it?

A. At the time I had—could not urinate until there was a sound of the fall of water—I believe the doctor gave me something for it, told me lots of times that he did, but didn't seem to do me any good; the only relief I could get was when mother or the gentleman that was helping my mother would pour water from a distance; the sound of the water would help.

Q. That was the only way you could have relief?

A. Yes, sir.

Q. How long did that condition stay with you?

A. It stayed right up to the present time.

55 Q. It is as much as before?

A. No, sir; not as much as before. I will tell you an instance at school, where I have just been going for the last nine months. There is a long tin pan where the boys go. Generally I was the first one to go in and the last one going away, and the noise would help me a little. It would take me so long sometimes I would not have time to get through.

Q. Did you ever have any trouble of that kind before this accident?

A. No, sir.

Q. Did you have any other troubles of any sort?

A. I think I was pretty near blinded, as my sight is badly impaired, as shows by the way I have to hold a book, and when I look a distance off have to close my eyes to see, and lots of times my eyes get to twitching and jumping and one thing and another.

Q. Have you had any trouble with your hands or wrists in any way?

A. Well, I was working for Dr. Dameron. He used to go for me because my hands were not as strong as a boy, he said, not half my age.

Q. What were you doing with them?

A. To vulcanise rubber they screwed it up pretty tight. They boiled the rubber in an iron pot.

Q. That is dentistry; he is a dentist?

A. Yes, sir.

Q. What do you call that machine?

A. A vulcanizer. He would screw it up pretty tight. The water, oil, and stuff would get in there and make it stick pretty tight. I could not open it. He used to tell me that boys half my age could open it with ease.

Q. What was the trouble that you could not open it?

A. I did not have strength enough.

Q. Whereabouts did you have to have strength?

A. Either when putting the stuff in—when you were putting it in you had to push it down or when taking it out you had to boil it. When you was closing it up worked this way, like plumbers do.

Q. Was it to pull from the shoulder or wrists?

56 A. Pull from the shoulder and wrist both.

Q. Did you ever find out which particular part of your arm was weak: whether it was the whole arm?

A. I think my wrist, because if I would take a pen or pencil, anything, and hold it, trying to write, I used to get my hands all cramped up right in there, making a grab for the pen like I was go-going to punch a hole through it.

Q. Have you any of your fingers that have been affected?

A. Yes, sir; that finger right there is dead, the third finger of the left hand, and those two fingers; they are just about dead, because they are of no use whatever.

Q. What is the trouble?

A. They are all burned; the doctor told me the cord was burned.

Q. You say they are of no use. Why?

A. Because, as a general thing, a person can lift something with one finger, anyhow: the little finger you have seen boys take an ounce weight and put it on their little finger, which I never could.

Q. That finger is the third finger of your left hand?

A. That is the way it will close (showing).

Q. You haven't any control over the muscles in that finger?

A. No, sir.

Q. Have you any scars on your body and whereabouts?

A. (Showing.) Right down there, all over (forearm); there and there.

Q. Any on your forehead?

A. Yes.

Q. Where?

A. There, where the blood was running out.

Q. State whether any of these symptoms or troubles you have named have ever interfered with any work of the kind you have tried to do?

A. Yes, sir; Dr. Dameron said he would take me as a student and learn the profession, but I had to give it up because I was too nervous and too weak.

Q. Did you ever have diptheria or small-pox or scarlet fever or spinal meningitis or anything like that?

57 Objected to.

A. No, sir.

Q. Tell the jury whether you saw the fire of burning coal before you ran into it.

A. I walked up the railroad; noticed everything as I was going along; there was nothing but a little bed of ashes; it didn't look like there was any fire or anything at all; the only thing I could see about the thing—the fellows they walked up along the hill or around this hill or something; I did not know what that was for.

Q. Did you know that there was any fire there before you got into it?

A. No, sir.

Q. What kind of a day was it?

A. Well, sunshiny, pretty warm.

Q. Was it calm or windy?

A. Well, it was calm; there was no wind or rain, or anything like that; the sun was shining bright.

Q. Was there any guard or any kind of fence around it?

A. No, sir; at first I was afraid to go up for fear there might be some sign, "No admittance," something like that, but there was no such sign; nobody said a word except two or three men; what they said—the only one that told me to do anything was the fellow that told me to go out of the way of the car up in the top of the house up there.

Q. When that coal car was coming out to get out of the way of the car?

A. Yes, sir.

Q. Have you ever seen the place since?

A. Yes, sir; I was up there; I could not tell you; two years ago. I don't think it is that long; I could not tell.

Q. Where were you running to when you fell in?

A. Well, I was making the best road I knew how to the bridge, to the hotel, right across a little bridge where you reached the hotel; run in that direction to the bridge (showing) and sort of in that direction to the hotel; I was making the shortest cut I could find.

58 Cross-examined by Mr. TELLER:

Q. You went up the path, did you?

A. No, sir; I did not.

Q. How did you get to the shaft-house?

A. I followed the trapper boy that was going to that place. He turned around the hill and I walked up the railroad.

Q. Did you go up the track then?

A. I went up the track to the switch, and then I went down to the switch and stood there watching a man pushing some freight cars. I told you before.

Q. You have been examined in this case before?

A. Yes, sir; I was.

Q. At the former examination didn't you say you went up that path?

A. I said I went up a path to the railroad track and went up the railroad track to the switch and down the switch.

Q. Did you say anything about going up with any trapper boy before?

A. No, sir; I did not.

Q. Why didn't you?

A. Nobody asked me, for the simple reason.

Q. There didn't anybody ask you this time?

A. Well, he let me tell it before he asked me questions: this time he let me tell.

Q. At the former trial, when you was a witness, did you say anything about going out with these boys in the forenoon?

A. No, sir; I did not. You didn't ask me anything what I done before dinner at all.

Q. Didn't ask you this time, did he?

A. No, sir; as I told you before, I was telling my own story this time.

Q. Well, from the railroad track to the shaft-house how did you go, by the path?

A. No, sir; I walked up the switch and down the switch to where the man was pushing cars.

Q. Well, did you go around that slack pile or hill?

A. No, sir; if you will please examine this you will see how I went up there. You can tell by the railroad track.

Q. When you were sworn before this, "I walked right up a certain track to the railway track, and then I walked on the
59 railroad track around the hill and came back along the railroad track."

A. That is about the substance; you could not get around a sort of a hill, whether you go around the railroad tracks or whether you go over.

Q. Did you go around a hill?

A. I suppose I went around a part of a hill; yes, sir.

Q. Well, now, did you go back the same way?

A. No, sir; I did not.

Q. Which way did you go back?

A. I went through the shaft-house and started the shortest cut for town.

Q. So that you ran right into this slack pile in cutting across?

A. I don't know whether I ran into it, or whether I slipped and fell into it.

Q. How far distant was you from these boys when you saw them come out of the mine with the lamps on their heads?

A. I was about ten or fifteen feet away.

Q. You heard them holler?

A. The first—how I got my attention attracted by them was somebody laughing and talking, so I turned around, and as soon as I seen them come out they made a dash for me, and began to yell, "Let's grease him! Let's burn him!"

Q. At the former trial you could not tell what they said?

A. You could not hear. They were all yelling. I could not tell what all of them said.

Q. Did you not say at the former trial you could not hear what the boys said?

A. I could not tell, the sound was so mixed up, what some of them said.

Q. You said that?

A. I think I said that. I can tell you what some of them said now.

Q. If you could not tell what some of them said——

A. If you ever heard persons yell you know some of them yell in a louder voice than others. That is how I found out.

60 Q. You said then you could not hear what they said; now how do you say?

A. Simply this: there were more than one of them to yell, and there are different tones in everybody's voice: some yell louder than others.

Q. Do you say now you could hear all they said?

A. I could tell what boys said it. I heard "Let's grease him," and "Let's burn him."

Q. Then when you heard that you turned round, did you?

A. Yes, sir.

Q. Did you look around as you ran?

A. When I went through the shaft-house they were still coming around the corner. As you go around the shaft-house there is a corner of the thing; I turned around and saw they were still following me—still coming. I did not turn plump around; I turned my head around.

Q. When you was sworn before weren't you asked this question, and did'nt you answer it, "How did you come to fall in?" "A. I don't know how it was. I think I was running with my face that way—looking back of where I run—just about as somebody yelled. I gave a quick sort of look around that way and fell."

Answer. I don't say anything different from that now. I say I don't know how I fell. I don't know which way my face was turned in making a dive. I didn't say my face was in front of me.

Q. Here you said you was looking backwards to see the boys, and somebody yelled. You gave a quick sort of look around; in that way you fell. Do you say that is true now?

A. Well, I think it is, as far as my knowledge goes.

Q. And then, in answer to this question, didn't you say this: you was running then, looking backwards towards the boys that had said grease him, and you answered, Yes, sir?

A. Ain't that what I said — I turned? That is just ex-
61 actly what I say now. Whether I was looking back at the time I fell or not I can't positively say, and I think I said the same thing in the former trial.

Q. And you say it now?

A. Yes, sir.

Q. Now, were you on the path before you fell into the fire or not?

A. Well, there is another point. I think I was; to all probability I was.

Q. On the path?

A. Yes, sir. I might—might not have been. I can't tell.

Q. On your former examination didn't you say in answer to this question, "You heard somebody say stop; you looked around the other way. That threw you. A. I don't think it occurred in that way. I think I missed the path."?

A. Well, it is just this way: There is a jutting rock in this thing where it pointed out from the shack idea. You have to go around a sort of sharp corner there. There is the place I think. I fell.

Q. You missed the path there then?

A. I think I did, sir.

Q. About the time when you fell you were looking around towards the boy, were you?

A. Well, I guess I was. I could not say exactly.

Q. When you went up there you say you saw somebody pushing a car?

A. Yes, sir.

Q. What kind of a car was that?

A. That was a big car that they used to haul coal in.

Q. A big coal car?

A. Yes, sir.

Q. How many men were pushing it?

A. There was one, and he was pushing it with a crow-bar.

Q. How was he using the crow-bar?

A. Well, it was kind of flat on one end of it. He put it between the wheel and the track and he would bear down. He at last finally gave up the attempt to get it to move that way. He turned around, started to push it, and he could not work it that
62 way; so he asked me either to give him a lift or a push, I forget which.

Q. He could not work it with a crow-bar under the wheel, so he threw that down and began to push it, and asked you to help him?

Q. Yes, sir.

Q. You helped him, I suppose?

A. I believe I said so.

Q. How far did you and he push that car?

A. Well, there was a slight grade there—whatever you would call it—slight uphill; when you got it on the other side of that thing it would go down itself.

Q. You were pushing it upgrade?

A. Then I walked down.

Q. How far did you push it upgrade?

A. Well, I can't tell. I didn't measure the upgrade.

Q. Then you went up above where the scales were?

A. Yes, sir.

Q. And you say somebody told you to get out of the way of the cars?

A. That is right.

Q. Didn't they tell you to go away from there and stay away?

A. No, sir; they did not tell me to go away from there or stay.

Q. Did anybody?

A. No, sir; everybody that I spoke to was civil and polite to me.

Q. Didn't tell you to go away at all?

A. No, sir.

Q. How long did you stay around there after he told you to get out of the way of the cars?

A. I stayed up there about ten or fifteen minutes; the exact time I can't say.

Q. Then where did you go?

A. I went down-stairs; the fellow was going to put some mules down. I asked him what he was going to do with them, and he said he was going to put them down the shaft.

Q. Well, then where did you go?

A. I stayed around there.

Q. Standing around until you saw these boys?

A. Yes, sir; or playing around; I don't know which.

Q. You don't remember much about your stay at Erie after that, do you?

A. No, sir; I do not.

63 Q. Don't you remember after you came down here you had a doctor?

A. Yes, sir.

Q. Who was he?

A. He was Dr. Smythe.

Q. Is it this Dr. Smythe that is here now or the other one?

A. I don't know. I don't see any here.

Q. It is Dr. Smythe over there on the seat, isn't it? Is that the man?

A. I think that is the man.

Q. You had him the minute you came *down* here—the same day?

A. I don't know whether it was a minute or how long it was.

Q. The same day?

A. Yes, sir; it was the same day.

Q. You say he doctored you about how long altogether?

A. I suppose about eight months.

Q. How long did he doctor you for these burns?

A. The whole thing was for these burns.

Q. How long, then, before these burns healed?

A. The exact time I can't tell you. I was in bed from two to four weeks when he came to the house; when I got up I went to his house.

Q. In bed from two to four weeks?

A. About that time.

Q. How long after that did you go to him after you got up? Did you go to him for these burns?

A. I went pretty steady for about eight months; about that time.

Q. Were these burns healed at that time?

A. Well, no, sir; I don't—could not positively say whether they were fully healed at that time or not.

Q. You could not? You can't state whether it was eight months or not before they were healed?

A. No, sir; I cannot.

Q. How often did you call on the doctor during that eight months?

A. At first I called on him about ten times; at first I used to call pretty near every day for about a month, and then my hands healed up here; he doctored after that—well, my hands were not exactly healed up; they were pretty near the healing point, and he
64 doctored me then for my other complaints.

Q. How long did he doctor you for the burns themselves and not for the other complaint before he commenced on that?

A. I could not say exactly; I know he did not prescribe anything very much after the first prescription. He just told me to keep oiled rags or oiled silk or something—put salve on them all the time until they had healed up. He thought possibly they might heal up without any further trouble; he did not know.

Q. Did he make any prescription at all after the first two weeks for those burns?

A. Well, I don't suppose he did; I suppose he changed the working of it a little. At first he used to give me very strong carbolic acid, and then I think about a month after he put it down to just a solution of carbolic with carbolic salve, and then he put it down to just a slight solution of carbolic in the salve.

Q. You say now three of your fingers are dead. What three fingers?

A. One on that hand; two on that hand (showing).

Q. What do you mean by dead?

A. I mean they are in such condition they are no particular use; they ain't ornaments; they ain't useful.

Q. Can you open and shut your fingers? Let us see you do that.

A. I can do that. (Witness holds up his hand and closes it.)

Q. What is the matter?

A. Do you suppose you could lift a hundred pounds if your hand was to fly up, back——

Q. Do you mean to say that you cannot lift?

A. I can lift something, but nothing towards what any boy of my age should lift.

Q. How is it with the other hand?

A. The other hand was not so badly done up. I can do better with my left, possibly, than my right.

—. How is it with the other you say is dead?

A. That finger right there is stiff; one of the cords burned through.

65 Q. Did you ever show that to the doctor?

A. Yes, sir; I think he has seen it many a time.

Q. Was that finger particularly burned?

A. Well, I don't know that it was particularly burned or not; there is no way of telling.

Q. Was it burned any more than the other fingers?

A. It must have been; there must something have occurred to it to cause it to do that.

Q. Is there any scar on any of your fingers now?

A. Yes, sir; scars all over my whole hand.

Q. Show any scar you have got to the jury, please. Is there any scar on your other hand at all?

A. Witness exhibits scars on hands, wrists, and arms. Scars on my wrist; you can see them.

Q. Show them, and that dead finger of yours.

A. Here is that dead finger.

Q. Any scar on that?

A. Yes, sir; there is a scar on that.

Q. Except for what you say, the lack of strength, you have the same use of your fingers you have ever had, don't you?

A. No, sir; I have not. Supposing if they were never burned, I could be in some sort of profession; now I never can. I not only suppose it; people that were going to learn me tell me so.

Q. You mean Dr. Dameron told you you were not strong enough to hold the vulcanizer?

A. Also told me I was too nervous to hold the instrument.

Q. You attribute that weakness and nervousness to falling in the fire.

A. You don't generally have weakness and nervousness of any kind except from something breaks your constitution, makes you that way.

Q. That is your idea?

A. Would be most anybody's idea.

Q. Your other difficulty, cannot urinate—sometimes urinate too frequently; in other words, you have not good control of your urine, you attribute that to the fire?

66

A. I should not suppose it would come without it. That is what Dr. Smythe says, or, at least, said, but he didn't acknowledge it now, but he said it would naturally follow after such a nervous shock.

Q. He don't say it now; he didn't at the former trial.

A. I never heard him acknowledge it.

Q. You heard him say it was not likely to follow?

A. I never heard him say it was not likely to follow.

Q. Did you hear him examined?

A. Yes; he said, if you will please look—he went backward and forward until you could not tell whether he was going to say so or not.

Q. You have stuck to it that difficulty of urination came from being burned?

A. I should naturally suppose so, because I never had it before I was burned.

Q. You think because it came after the burn it must come by reason of the burn?

—. ——.

Q. That is the way you reason on it?

A. Yes, sir.

Q. What business, if any, had you up at the mine when you went there—what did you go there for?

A. I went there to investigate the workings of the mine as you go any place.

Q. Out of curiosity?

A. You might call it curiosity. It would be knowledge to anybody to see the workings.

Q. You hadn't any business there?

A. I don't know that anybody told me.

Q. You wasn't going there to work or wasn't sent to go there, anything of that kind, was you?

A. No, sir.

Q. You hadn't been invited to go there, had you?

A. Well, I suppose that all mines have got an open invitation to come and see the workings.

Q. That is what you supposed?

A. I have been to Gold Hill.

Q. Nobody had asked you to go there or told you to go
67 there on business or otherwise, had they?

A. No, sir.

Redirect examination by Mr. MILLS:

Q. You say there was a hill you went around. You mean by that hill——

A. That dump pile there.

Q. This dump pile they talk about being sixteen feet high?

A. Yes, sir.

Q. That is what you mean? You went up the main track here?

A. To the switch; walked down the switch. This dump pile was in between the two tracks.

Q. You came up along here, you say?

A. That is the wrong way of the thing. That is where the switch stands. There is the mine. Here is about where I walked up towards the river, about like that (showing). The fellow with me, he went this way. I went around this way, up this track. This is the hill.

Q. That big 16-foot dump pile you were talking about?

A. Yes, sir.

Plaintiff also introduced Dr. SMYTHE, who gave evidence tending to show that he has been a physician for a great many years; recalls the time he attended the boy George McDonald for burns; cannot give the date. During those two weeks he was on Curtis street. After that I think he came to my office occasionally; don't remember how long; does not remember the boy's speaking about the urinary trouble at the time of his sickness, but remembers something being said about it afterwards. I have never kept any record of his case except the visits; did not remember of telling Mrs. McDonald that the urinary trouble would result in a symptom, but might have said something about the effect that burns sometimes produced on the kidneys or urinary organs; only knows in
68 a general way what the burns were; they involved the hands, more or less, and the forearm; did not extend above the

elbow; only remembers in a general way; does not know at what place he was burned or how it came about.

On cross-examination witness gave evidence tending to show that he was examined about this matter a year ago; remembers answering Mr. Mills' question at that time, "How long was he under your treatment?" thus: "By referring to the books I find it was from the 5th of September to the 21st," and that that answer was undoubtedly correct; remembers the question on cross-examination at that time, "You think he was under your charge from the 5th to the 21st?" Did not visit him during all that time. During the time he treated McDonald thinks he was in bed five or six days and then was able to sit up; has no recollection of treating witness for eight months and calling on him as often as ten times a week. From the nature of the burns he would not apprehend any serious difficulty arising from them of any kind and did not at the time. From what he saw don't think *think* he apprehended any difficulty to the boy's urinary organs. It was impossible at the time to tell how much stiffness would be left in his hands; always more or less contraction following a burn, which frequently disappears in time; it usually disappears in time unless the burn is very deep and does not affect the joint; didn't think he was apprehensive of the joints stiffening at the time; thinks there was no joint trouble.

On redirect examination the witness testified: Don't remember of swearing at the former trial that he considered these burns very severe. The burns were severe as far as suffering was concerned,
but in a constitutional way they were not; remembers in a
69 general way how the burns were produced; was told he fell into some fire at the coal pits. The severity of a burn depends a good deal on the locality. The least troublesome place to burn would be the hands and forearm; the neck would be serious if deep. Witness did not remember any burns on the forehead, but examined forehead before the jury, and finds a scar about three-quarters of an inch long; the location of the scar is about as he remembered it; present appearances indicating that all the burns of the plaintiff were superficial; don't know whether a person falling into burning coals could escape without a shock or not; never discovered any nervous symptoms at that time that he remembered of; there was inflammation in his arms, which was confined to the burn, perhaps a little more than that; presumes there was some swelling away above the burns; remembers one of his burns was very near the elbow; his recollection is it was immediately below.

On recross-examination witness testified: Did not take much notice of the little burns; the principal burns were on the hands; he treated whatever burns there were that needed it at the time; gave him some internal medicine for the fever; the fever came on the first few days. The question asked him by Mr. Mills at the former trial and the answer were: "Were they very bad?" "A. Burns always look badly; the hands were pretty badly burned."

Dr. Smythe was also subpœnaed as a witness for defendant.

Plaintiff also swore as a witness Doctor LEWIS, who gave evidence tending to show that he is a physician—has been for twenty years—practicing in Denver. The particular results to a boy of McDonald's age, burned as he was, would be a very severe burn, which would necessarily be a very severe shock to the nerves.

70 Q. Would urinary troubles of any kind result probably from a state of facts such as I have named?

A. Besides the nervous shock there are often physical effects produced by burns that are entirely remote from the location of the burn. For instance, a person may be burned on the skin severely and there will come ulcers in the lungs which will produce consumption. At other times there will be ulcers formed in the bowels, at other times in the urinary tract, maybe in the kidneys, maybe in the bladder, producing death in a very short time. Sometimes it is very wonderful in how short time disease results from a burn.

Objected to by counsel for defendant. Objection overruled; to which counsel for defendant then and there excepted.

The mucous membrane of the internal organs is of same character as the skin; partakes of the same and naturally sympathizes with the same effects. Ulcers sometimes heal very readily; produce a permanent cycatrix. There will be a permanent ailing following. In this case should expect nervous symptoms would be visible, at least. Anything that produces an extra amount of excitement or irritation upon the nervous system has a tendency to wear out the vitality and shorten the person's life.

Cross-examination:

If a child gets frightened it certainly tend to shortens his life to a certain extent. If he burns his hand it is liable to produce urinary trouble. In prescribing for a person who had a surface burn on the hand would not expect urinary trouble; should not expect it to be visible; would not have any reason to indicate to anybody any fear about a slight burn; meant to say he could not tell what small causes might produce bad results; always hopes for the best and looks for the worst; thinks if he had had McDonald's case, and had never had one before, he should not have had any serious

71 apprehension, although it might arise. A great many unexpected things happen in medicine. There is a general course a physician having experience and knowledge can predict, but he has always to keep on the watch for anything unpleasant. This burn was a severe one, and the physician ought to have looked for almost anything in any part of the system, especially the internal organs. A burn may affect the urinary organs by producing ulcers upon the mucous membrane of the urinary tract. The best medical testimony in the world says that because of a burn on the hand the inside of the lungs, the mucous membrane of the lungs, may be affected. There is reason to expect that a burn on the hands will produce an ulcer on the lungs. Medical post-mortem examinations have shown it to be the case. A burn on the hand operates to pro-

duce inflammation or an ulcer in the stomach because of the affection there is in the nerves of the hand, the peripheral extremity of the nerves. The effects of the burns upon the periphery of the nerves in the hand may affect the periphery of the nerves in the stomach; has never known them to, but they can; has read in books where an affection of the lungs has been attributed to burns on the hands, but never knew of such a case. It would operate the same way on the urinary organs because of the similarity in the mucous membrane. It is not a fact that all the operation would be on account of the skin being burned, the secretion of the kindeys not coming through the skin. Dr. Smythe might have been mistaken in regard to it; has been practicing twenty years in Iowa and Nebraska; homeopathic; graduated at Hahemann medical school, Chicago; don't know that it is necessary that he should know of a burn causing trouble with the urinary organs; simply stated what he found in the best authorities; never met with such a case in his practice. If a burn is severe, he looks for more
72 serious consequences than from one that is limited. The burns this boy had I should call very severe, not superficial burns. If the skin and flesh is sloughing off, it is a severe burn, not a superficial burn.

Plaintiff also called as a witness Doctor DAMERON, who gave evidence tending to show that he is a dentist; knows plaintiff, George McDonald; was in his employ; he seemed to be weak in one hand or arm; always complained of it, and could not do the work of other boys of his age and size; he was not strong enough to do the work that could be done by other boys of his age.

On cross-examination witness testified that he supposed there was a great difference in the strength of boys; don't know as there is a great difference in the strength of their wrists; don't see why there should be; all he knows is that George was weak in this arm; was the only boy of his age and size that was not able to put his vulcanizer down. Witness speaks from the experience he has had with ten or twelve boys.

Plaintiff also introduced as a witness Docter WHEELER, who gave evidence tending to show that he has been a physician and surgeon for about 23 or 24 years, and practiced in Denver about 18 years and a half; has examined the burns on hands and wrists of plaintiff.

Q. Tell the jury what kind of burns those scars indicate, whether superficial burning or deep burning.

Objected to by defendant. Objection overruled; to which defendant, by its counsel, then and there objected.

Some of the burns were deep. In case of a boy having an accident such as George had it is quite possible for constitutional
73 symptoms to follow, and particularly at the age of 12 years, about the changing from childhood to manhood. Witness says twelve years because the heightened condition of the nervous system of a girl or boy at the age of puberty makes a susceptibility

of the nervous system greater then than at any other, so there may be troubles arising from injuries or shocks to the nervous system occurring at that time that would not come at a later or at an earlier time in life. Nervous excitement is a very common origin for other nervous diseases to arise, and this is particularly true of the urinary organs. Any nervous shock has a tendency to produce specific relaxation or a spasmodic condition alternating perhaps of the urinary organs.

Q. If urinary troubles of this character that a boy never had before and since an occurrence of the kind, receiving the burns in that way, he is unable to control his urinary organs, the urine coming at times unbidden and at other times requiring the sound of trickling water in order to cause the start, would that, in your judgment, when this immediately set in soon after or immediately after these burns—what would you say in your medical judgment as to their being a connection between the shock and fright and burns and this urinary trouble?

Objected to by defendant. Objection overruled; to which ruling of the court defendant, by its counsel, then and there excepted.

As to there being a connection between the shock, fright, and burns and the urinary trouble, would say that the symptoms might arise from the shock and also from the wounding of the terminal nerves of the skin. Either might be capable of producing such symptoms.
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On cross-examination witness testified that he first examined the boy some time last fall; examined particularly the scars on his hands and arms; that it is possible to tell nearly six years after a burn has taken place whether it is superficial or deep. A deep burn goes through the skin and into the flesh. A burn through the skin, in his idea, is a deep burn. A superficial burn is where the first, the scarf, skin is destroyed. A burn that would not blister might be too deep to be either a superficial one or one that would raise a blister. It is peculiarly the superficial ones that detach the epithelial layer from the true skin. There the blister occurs. What he calls a superficial burn would occur from anything strong enough to blister the skin. The deep ones are anything more. Anything going through the true skin he would call a deep burn. He might apprehend serious consequences from burns of this kind, but they would not necessarily follow. When he has a sick or wounded patient he apprehends anything consistent with his condition. When he sees a man with a burn or little wound on his hand does not necessarily apprehend serious consequences—simply anticipates it. It is possible it may happen. The effect of a shock, fright, or excitement on a grown person in perfect health would pass away. In the excitable state of a child passing childhood to puberty it might come at a time that would make a permanent condition. It may not; it may only be transitory. The change from childhood to puberty occurs in boys usually at about 12 years. It may vary a great deal, as it does in girls. The change is sometimes months

in occurring, sometimes years—a few years. On an average it would take nearly a year.

The plaintiff put in evidence the American mortality
75 table showing the expectancy of life in one of 12 years to be 47 years.

Thereupon defendant, by its counsel, moved the court to instruct and charge the jury that the plaintiff could not recover upon the evidence offered.

Which said motion was overruled, and the defendant, by its counsel, then and there excepted.

Defendant, to maintain the issues on its part, introduced as a witness MAX GREENFIELD, who gave evidence tending to show that he lives at Erie; lived there in 1884; has known the Boulder Valley mine since 1881. The slack pile was burning there at different places during that time. The company was depositing its fine coal there and letting it burn out—that was their habit; saw the boy there at the time he was hurt; was up in the weigh office; saw the boy come up from below; heard Mr. Miller calling to some one to go away—that that was no place for him—there was danger—to get down. He would not go. I looked, and we both called to him to go away from there and get down. He finally left; only told him at that time to go down; did not see him any other time. This was in the forenoon between eleven and twelve; didn't see him when he was hurt; didn't see the fire; never knew of any other children falling into that place; has heard the other witnesses described the path; it had been travelled a year or more and several years by the miners and those around the mine; was an ordinary foot-path.

On cross-examination witness testified that to the best of his recollection it was before dinner; he was upstairs; don't recollect of seeing him in the afternoon after dinner at any time than this.

There is a window in the weigh office towards the scales that
76 shows towards the town; don't remember whether the window was up or down when the boy was there; he (the witness) was there the afternoon of the same day; heard some boys hallooing; went towards the window; saw some one picking up the boy from along the pathway where the slack was that was on fire. Witness thinks he could tell the boy now; has seen him since then; saw him at the other trial, but would not swear that it was George McDonald up in the weigh office the forenoon he was hurt. To the best of his recollection it was in the forenoon the accident occurred, though he might be mistaken.

On redirect examination witness testified that plaintiff was near the shaft-house where the coal is hoisted up; witness told him to get away from there—down-stairs, which was all he told him. Plaintiff did as he was told, which is as far as he knows about it.

Defendant also introduced as a witness W. K. MILLER, who gave evidence tending to show that he now lives and in 1884 lived in

Erie, working at Boulder Valley mine; was there the day the accident happened; saw the boy there in the morning about between ten and eleven; could not swear positively as to plaintiff; it was the boy that was burned that forenoon; he was on top where I was dumping coal; I told him to get off; I blacked his face; this was a short time before the accident; I think the accident was before dinner; while he was with the company it used this slack pile occasionally for burning slack; never heard of any children or men being injured by falling in there; didn't see the boy after he was burned, only as he was going across after it happened; he was being led and carried together, I believe; from what he saw of plaintiff then could not identify him as the one who was there before; didn't know who the boy was when he was there in the forenoon; didn't know him then, don't know him now, and can't identify him.

77 GEORGE MCDONALD, being recalled, testified: Was not engaged in business at the time he was hurt; began to receive wages about a year afterwards; was then between thirteen and fourteen years old; received from Dr. Dameron wages, about four dollars per week; was learning dentistry; left Dr. Dameron because he was told he would not make a success of the business; then started to printing; worked for Walgren and Taussig about a year; got about four dollars per week; then went to work for Barkhausen & Lester at six dollars per week; the average amount earned during the two years was five dollars per week; the average wages of a good worker in the printing business is from $30.00 to $40.00 per week; in dentistry is about $50.00 per week; that is what Dr. Rogers paid Dr. Moffatt.

On cross-examination witness testified: The wages of $30.00 or or $40.00 per week is for job printing; the wages are fixed by the typographical union; a fair printer's wages is $30.00 to $40.00 a week; an expert's would be about $40.00.

The above was all the testimony introduced on the trial of said action.

Defendant then asked the court to instruct the jury as follows:

The court is asked to instruct the jury that there is no- sufficient evidence to warrant the jury in finding that the plaintiff has received any permanent injuries or impairment of his capacity to earn wages, and that because such serious injuries, if any, are not shown — have followed after the other is not sufficient to warrant the jury in finding that the one is the cause of the other.

78 Which instruction the court refused to give; to which defendant, by its counsel, then and there duly excepted. Thereupon the court, on its own motion, instructed the jury as follows:

GENTLEMEN: The foundation of the plaintiff's action is the charge of negligence against the defendant. Negligence is the omission to do something which the law enjoins or which a reasonably prudent man would do under like circumstances or the doing of something which a prudent and reasonable man would not do under the par-

ticular circumstances. The alleged negligence of the defendant consists in erecting and maintaining a burning pit of slack coal at a place and under conditions which made it dangerous to persons not having previous knowledge of its existence and neglecting to fence the same, as required by the statutes of this State.

There is no controversy about the leading facts of the case. The defendant was operating a coal mine. The main track of its railroad ran near the mouth of the mine or pit and parallel to the main line, and one hundred feet, more or less, from it ran a side track or switch. The road-bed of these two tracks was six or eight feet higher than the intervening space between them, and into this intervening space the defendant dumped the slack coal from its mine, which ignited by spontaneous combustion and burned continuously. The dumping of the slack and its burning continued during the several years the defendant operated the mine. The length of the slack-dump pile was four or five hundred feet and its width varied, being sixty-eight feet at the north end near where the path crossed the intervening space between the two tracks.

The mine and machinery to work it was on the east side of the railroad tracks mentioned. On the west side of the tracks and opposite to the mine and only five or six hundred feet from it was the town of Erie, containing five or six hundred inhabitants, and about five hundred feet south of the mine was the railroad depot.

Persons going down from the town to the mine were accustomed to cross the space between the two tracks by a rather rough and uneven path which ran on a shale and rock dump very near the edge of the burning slack pit. In clear, calm weather the burning slack emitted no smoke or steam, and the surface or top being covered with ashes or other incumbustible matter the fire could not be seen, and persons having no previous knowledge of its existence could not detect it by any other sense than that of feeling, and to detect it by that sense they would have to come into actual contact with it. It was not dangerous in appearance, and there was nothing from which a stranger could detect its dangerous character. The children and others living in the town, as well as strangers, were daily in the habit of going to the mine to witness its working and for other purposes, and in doing so crossed the space between the two tracks by the path before mentioned. The defendant did not prevent or prohibit persons from visting its mine. The law of this State required defendant to fence its slack pile; this it did not do, nor did it do anything to advise the public of the dangerous character of this slack pile or to prevent persons or stock from getting into it. In this state of things the plaintiff, then less than
79 thirteen years of age, visited Erie with his mother, who stayed at the hotel of the village. While there he went over to this mine out of curiosity and a desire to see the mode of operating it. While at or near the mouth of the mine some miners, men or boys, in their mining costumes, came out of the pit, and in sport or in earnest, it is immaterial which, said something about blacking or greasing him, probably advancing on him at the same time. Thereupon the plaintiff ran towards the village, and in crossing the space

between the railroad track missed the path, ran into the slack pit, and was burned in the manner detailed in the evidence.

It is not claimed the plaintiff had any notice or knowledge of the fact that there was any fire in the place where he received his injury or that by the exercise of reasonable care and diligence he could have seen or discovered the fire. The law made it the duty of the defendant to fence its slack pit, and if it did not do so, and as a result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable.

Persons are entitled to the protection which would accrue from a compliance with the statute, and the plaintiff had a right to presume the space between the railroad tracks was not a burning slack pit because it was not fenced. It was the legal duty of the defendant to fence the burning slack, and its omission to do so was negligence.

The defendant being guilty of negligence, your next inquiry will be whether the plaintiff was guilty of any such negligence as will prevent him from recovery, for it is a principal of law that one injured by the negligence of another cannot recover damages for such injury if by his own negligence he contributed to the injury.

Upon the undisputed facts of the case it was not an act of negligence for the plaintiff to visit the defendant's coal mine as he did, and he was not a trespasser there in a sense that would excuse the defendant for the acts of negligence by which he was injured, and which I have heretofore adverted to; nor was it an act of negligence for the plaintiff under the circumstances to run away from the miners. A boy may lawfully run to avoid injury or when frightened or in play; and the fact that the plaintiff was running on the occasion of his injury does not constitute negligence on his part.

He undoubtedly had a right to run toward the hotel where his mother was stopping. Nor was it negligence in him when he did run not to follow exactly a rough, irregular, and narrow path leading from one railroad track to the other. There was nothing in the surroundings to inform him or any other person having no previous knowledge of the facts that he would incur any risk or danger in not keeping in the path in crossing the space between the railroad tracks, and if you find he did not see the fire and could not with the exercise of reasonable diligence discover it and did not know it was there and that the surface of the pit apparently presented a safe footing and passage, then he was not guilty of any negligence in attempting to run across it.

The disputed issue in the case is the question of damages; what damages you shall award; and first, gentlemen, you will compensate the plaintiff for the pain and suffering he endured by reason of the injuries he received on this occasion.

If a man takes from you your horse, there is a measure of your damages in that case, because you can call witnesses who have some knowledge of horses and their value and prove the
80 value of your horse. If a man takes from you a hundred bushels of wheat, there is a measure of computing the dam-

ages. In that case you do not even have to call witnesses to do it; you may take into court the price-list or price-current, as it is called, and show what the value of wheat was in the wheat market at the time your wheat was taken, and that settles it. But there is no price-list, there is no price-current, for pain, for human suffering. You do not have to put a witness upon the stand and ask him the value of suffering for an hour, for a day, for months, or for years; you do not have to call any witness for that. The value that shall be put upon pain and suffering is left to you, gentlemen; to your own good common sense and experience; you value that—that is, award of damages for it—from your own knowledge and upon your own judgment, unaided by any witness, for the law cannot call a witness to aid you.

And that is one item of the plaintiff's damages. He is entitled to compensation for the pain and suffering he endured immediately after the injury, at the time of the injury and afterwards down to the present time, and any pain or suffering that you find from a preponderance of the evidence that he may have to endure in the future.

He is entitled, as another item, to compensation for any expenses that he may have been put to on account of this injury and which have been proven to you by the evidence; he is entitled to compensation for the loss of time and the value of that time, whatever the evidence shows, if anything, resulting from this injury, not only the loss of time from the time he received the injury down to the present time, but for loss of capacity, if any, to earn, by the ordinary pursuits of life open to a young man of his knowledge and condition in life, a living in the future; if these injuries are permanent, if you find by a preponderance of evidence that they have resulted in the infliction of permanent injuries, which impair his capacity or ability to work or earn wages in the future, you will take that into account.

These are the items of damages you take into consideration; you take all the circumstances, all the facts proven, his age, the character of the injuries with reference to their being permanent or not, and, if permanent, what is the degree of disability imposed by them, and all like considerations you will take into the account when you come to determine the compensation that you will award to the plaintiff for these injuries.

The plaintiff's attorney has said to you, gentlemen, that he claimed, and that you ought to award, more than a compensation. He is not content with compensatory damages—that is, the damages you shall find and award to him for his pain and his suffering, for his expenses, for his loss of time, for the disability that he sustained, if any. He says those are not elements enough, and that in addition you should award him damages as a punishment to this defendant for not having complied with the statute. That you cannot do, gentlemen. That claim is not supported by the law. It is moreover in the very teeth of the statute of the State under which it is claimed, for that statute in terms says that the persons or the corporation neglecting to fence these slack pits shall be liable to any party in-

jured thereby in "the amount of the actual injury sustained," thus in terms cutting off exemplary damages.

Now, gentlemen, I need scarcely say to you that you will decide this case precisely as you would if two of your neighbors were the parties and in no other light or sense; that you will give
81 to the plaintiff nothing because he is a natural person, a youth or a boy, just for that reason, out of sympathy for him, and you will add nothing to his verdict because the defendant is a corporation. You will decide this case as though it was a case between two natural persons. The law, gentlemen, is an utter stranger to this thing called sympathy and an utter stranger to prejudice, and the court or the jury that lets either sympathy or prejudice creep into their minds in the decision of a cause submitted to them commits a very grave mistake. You are the sole judges of the facts. Consider all the testimony, and, in the light of all the testimony on the subject of these injuries and their extent, determine what is a fair, just compensation to the plaintiff for the injury he has sustained; that will be the amount of your verdict.

COUNSEL FOR DEFENDANT: I suggest the question to which I called your honor's attention as to what, at least, the character of the evidence would show about the impairment of his powers. I think they ought to be instructed somewhat on that.

The COURT: I think not: I think the general instruction covers the ground.

I say to you again, gentlemen, you are the judges of facts; you give such weight to the testimony of each witness as you deem it entitled to. It is from that evidence you must determine for yourselves the character of these injuries and the extent to which this plaintiff is entitled to recover.

Gentlemen, if you find for the defendant, simply say:

"We, the jury, find for the defendant;" if you find for the plaintiff, say: "We, the jury, find for the plaintiff and assess his damages at so many dollars."

(By consent of counsel the court said:) When you agree on a verdict reduce it to writing, let your foreman sign it, hand it to the clerk of the court or his deputy, and then you are discharged until to-morrow morning. You are at perfect liberty to tell anybody what your verdict is when you disperse.

Counsel for defendant excepts to the refusal of the court to instruct that there was not sufficient evidence as to the question of serious or permanent injury and leaving the question of seri-
82 ous impairment to them, and also to the instruction not given and to the giving of the instruction as to all question connected with permanent injury and to the withdrawing the question of negligence of defendant and contributory negligence of the plaintiff from the jury.

Thereupon and on, to wit, the 18th day of June, 1890, the jury returned a verdict into court in favor of plaintiff for the sum of $7,500.00.

Thereafter and on, to wit, the 20th day of June, 1890, defendant filed its motion for new trial: which said motion is in words and figures following, to wit:

In the Circuit Court of the United States, District of Colorado.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff, *vs.* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Motion for New Trial.

Now comes the defendant in the above-entitled action and moves the court to set aside the verdict and judgment heretofore entered herein and to grant a new trial—

(1st.) Because the court erred in admitting incompetent, irrelevant, immaterial, and improper evidence offered by plaintiff against the objection of defendant.

(2nd.) Because the court erred in rejecting proper, competent, material, and relevant testimony offered by defendant.

(3rd.) Because the court erred in refusing to instruct the jury to find their verdict for defendant, as requested by defendant.

(4th.) Because the court erred in instructing the jury on its own motion.

(5th.) Because the court erred in refusing to instruct the jury as requested by defendant.

(6th.) Because the court erred in instructing the jury as requested by the plaintiff.

(7th.) Because the verdict and judgment are contrary to law and the evidence.

83 (8th.) Because the verdict and judgment are against the weight of the evidence.

(9th.) Because there is no- sufficient evidence to sustain the verdict and judgment.

(10th.) Because the verdict and judgment are excessive.

TELLER & ORAHOOD,
Attorneys for Defendant.

And afterwards and on, to wit, the 26th day of June, 1890, the court filed the following opinion on the motion for a new trial:

Opinion.

UNITED STATES OF AMERICA, } ss.
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado, June 26, 1890.

GEORGE McDONALD, Plaintiff.
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.
On Motion for New Trial.

CALDWELL, *C. J.:*

This case has been submitted on a motion for a new trial. The grounds assigned for the motion are misdirection of the jury as to the law and excessive damages.

The facts in this case which determine the legal liability of the defendant were not controverted at the trial and are not controverted now.

There is no ambiguity or conflict in the evidence relating to the question of the defendant's negligence. The controversy turns on what the rules of law are applicable to the uncontradicted facts and as to whether the jury were warranted by the evidence in assessing the plaintiff's damages at the sum of seven thousand five hundred dollars.

The law applicable to the facts of the case was correctly expressed in the charge to the jury. (Bennett *vs.* R. R. Co., 102 U. S., 577; Railroad Co. *v.* Stout, 17 Wall., 657; S. C., 2 Dillon, 294.)

As to the damages, it was quite clear to my mind upon the evidence, and, from an inspection of the plaintiff's head, hands, and arms on the witness stand at the trial, that the injuries he received were not slight or superficial, but that they were serious and had resulted in permanent impairment of his sight, permanent injury to his urinary organs, and permanent loss of strength in his hands and arms, and probably a permanent affection of his whole nervous system.

The court was asked to instruct the jury that there was not sufficient evidence to warrant them in finding plaintiff's injuries were permanent. That instruction was refused, because I believed
84 there was sufficient evidence to warrant such finding and that the fact was so. I did not, however, indicate to the jury that such was my opinion, but left the question to their determination upon the evidence.

What damages shall be awarded a plaintiff entitled to recover in this class of actions is a question of fact for the jury. As to some of the items of damages in such cases much is necessarily left to the knowledge, judgment, and experience of the jury and their sense of justice and right. There is no fixed measure of damages for some of the items which are to be taken into the account in such cases,

and men of equal intelligence and fairness often vary widely in opinion as to what would be a just compensation in a given case.

The assessment of the damages is one of the functions of the jury which the court has no right to invade or interfere with, except where the court has reason to believe that the verdict is the result of ignorance, passion, prejudice, or partiality or of a misunderstanding of the instructions or a disregard of them. It is not contended that any of these things can be justly charged upon the jury that tried this case. The most that is claimed is that they erred in judgment and the court is asked, in effect, to convert itself into a jury and ascertain the damages it thinks ought to be assessed in the case, and reduce the verdict of the jury to that amount or grant a new trial.

It is my observation and experience that a jury of intelligent, fair-minded men, familiar with the practical affairs of life—and the panel that tried this case I think may fairly be said to come up to this standard—are better judges of such a question of fact than the judge on the bench. But, whether better judges or not, it is their exclusive province to determine the question, and for a judge to substitute the damages he would assess, acting himself as a jury, in the place of the damages the jury have assessed, for no other reason than that he thinks he is a better judge of fact than the jury, is an invasion of the province of the jury and a violation of the constitutional right of a suitor to have his cause tried by a jury and the questions of fact in it determined by their verdict.

In this case the damages are not, in my judgment, excessive, in the sense that the jury could not upon the evidence fairly find that sum. It boots nothing that if the cause had been tried before me I would have found a somewhat less sum.

It is said that the former verdict in this case for twenty-five hundred dollars, a much less sum than the present verdict, was set aside by Judge Hallett because he considered it excessive. This argument suggests these observations:

First. It is conceded that on the former trial the statute requiring the defendant to fence its slack pile was not brought to the attention of the court, and hence it was a doubtful question whether the defendant had been guilty of any negligence, and this doubtless influenced the jury in making up their verdict and the court in setting it aside.

Second. There is nothing to show that the evidence was the same on both trials. From the fact that the court set aside the first verdict on the ground that the damages were excessive it is fair to presume that the plaintiff strengthened his case on this head at the second trial by additional proof as to the severe nature of his injuries and their permanent character; and

Thirdly. If the proof was the same at the two trials it only shows the widely different conclusions that men of equal intelli-
85 gence and equal opportunities will draw from the same state of facts.

I should feel very much like deferring to my learned brother Hallett on a question of law, but when we go outside of the law and

put ourselves in the place of a jury to pass upon the facts, I think a good, intelligent jury knows better how to do that than either or both of us.

And if this case, on the evidence I heard at the last trial, had been submitted to Judge Hallett and myself, sitting as a jury, and he had thought twenty-five hundred dollars an excessive verdict, there would have been a hung jury.

(Indorsed:) 1704. Circuit court, U. S. David George McDonald *vs.* The Union Pacific R'y Co. Opinion on motion for new trial. Caldwell, C. J. Filed Jun- 26, 1890. William A. Willard, clerk.

And thereupon the court overruled said motion for a new trial and ordered judgment entered on the verdict for the sum of $7,500.00; to which ruling of the court in overruling said motion for a new trial and ordering judgment entered defendant, by its counsel, then and there duly excepted.

And forasmuch as the foregoing matters and things do not fully appear of record defendant presents this its bill of exceptions herein and asks that the same be signed, sealed, and filed as of the 2 day of July, 1890.

By the court:

HENRY C. CALDWELL, *Judge*. [SEAL.]

(Indorsed:) 1704. Circuit court, United States. David George McDonald, by his next friend, Mary E. McDonald, *vs.* The Union Pacific R'y Co. Bill of exceptions. Filed Jul- 2, 1890. William A. Willard, clerk.

And afterwards and on, to wit, the 16th day of July, A. D. 1890, came again the said defendant, by its attorneys aforesaid, and
86 filed in said court and in said cause its bond and sued out of and under the seal of said court a writ of error and a citation to the Supreme Court of the United States.

And the said bond is in words and figures as follows, to wit:

Bond.

THE UNITED STATES OF AMERICA, }
District of Colorado, }

Know all men by these presents that The Union Pacific Railway Company, as principal, and Willard Teller and —— ——, as sureties, are held and firmly bound unto David George McDonald in the full and just sum of ten thousand dollars, to be paid to the said David George McDonald; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of July, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at the May term, A. D. 1890, of the circuit court

of the United States for the district of Colorado, in a suit pending in said court between David George McDonald, by Mary E. McDonald, his next friend, plaintiff, and The Union Pacific Railway Company, defendant, judgemnt was rendered against the said The Union Pacific Railway Company, said company having obtained a writ of error to reverse the judgment of the said court and a citation directed to the said David George McDonald, citing and admonishing him to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said The Union Pacific Railway Company shall prosecute
87 said writ of error to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue

THE UNION PACIFIC RAIL- [SEAL.]
WAY COMPANY,
By WILLARD TELLER, *Its Attorney-in-fact.*
WILLARD TELLER. [SEAL.]
DAVID H. MOFFAT. [SEAL.]

Approved:
HENRY C. CALDWELL,
U. S. Circuit Judge.

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss.*:

Willard Tellar and —— ——, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real rstate the sum below set opposite his name—that is to say,

As to Willard Teller, ten thousand dollars:

As to David H. Moffat, ten thousand dollars—

over and above all his just debts and liablities and in property subject to levy and sale upon execution.

WILLARD TELLER.
DAVID H. MOFFAT.

Subscribed and sworn to before me, at Denver, this 3rd day of July, A. D. 1890.

[SEAL.] CHARLES M. KENDALL,
Notary Public.

88 (Endorsed:) Gen. No. 1704. Circuit court of the United States, district of Colorado. David George McDonald, by Mary E. McDonald, his next friend, *vs.* The Union Pacific Railway Company. Bond on writ of error. $10,000.00. Filed this 16 day of July, A. D. 1890. William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error and return thereto is hereto attached, to wit:

Writ of Error.

89 Form C. D. 5.

Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
District of Colorado. }

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court between David George McDonald, by Mary E. McDonald, his next friend, and The Union Pacific Railway Company, a manifest error hath happened, to the great damage of the said The Union Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

WILLIAM A. WILLARD, *Clerk.*

Allowed by—
HENRY C. CALDWELL,
U. S. Circuit Judge.

90 [Endorsed.] Form C. D. 5. Gen. No. 1704. Circuit court of the United States. David George McDonald, by Mary E. McDonald, his next friend, plaintiff in error, *vs.* The Union Pacific Railway Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 16th day of July, A. D. 1890. William A. Willard, clerk, by —— ——, deputy clerk. Teller & Orahood, attorney- for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 23d day of September, 1890.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

The defendant having served the writ of error by lodging a copy in the clerk's office for the defendant and having given the security required in apt time, this writ therefore becomes a supersedeas.

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

91 And the said citation and acceptance of services thereof *is* hereto attached, to wit:

Citation and Acceptance of Service.

92 Form C 11.

Citation, U. S. Circuit Court.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to David George McDonald, by Mary E. McDonald, his next friend, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in District of Columbia, on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Caldwell, judge of the circuit court of the United States for the district of Colorado, this 16th day of July, in the year of our Lord one thousand eight hundred and ninety.

HENRY C. CALDWELL,
U. S. Circuit Judge.

93 [Endorsed:] Gen. No., 1,704 Circuit court of the United States, district of Colorado. David George McDonald, by Mary E. McDonald, his next friend, plaintiff in error, *vs.* The Union Pacific Railway Company, defendant in error. Citation. Filed in circuit court of U. S. this 11th day of August, A. D. 1890. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Teller & Orahood, attorney- for plaintiff in error.

Service of a copy of the within citation, served this 17th day of July, 1890, is hereby admitted.

J. WARNER MILLS,
Att'y for David Geo. McDonald.

94 And afterwards and on, to wit, the 18th of September, A. D. 1890, came again the said defendant, by its attorney aforesaid, and filed in said court and in said cause its assignment of errors.

And the said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

In the Circuit Court of the United States, District of Colorado.

DAVID GEORGE MCDONALD, by His Next Friend, MARY E. MCDONALD, Plaintiff, *vs.* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Assignment of Errors.

Now comes the defendant, The Union Pacific Railway Company, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

First. The court erred in refusing to give the instruction asked by the defendant, which instruction as asked was in the words and figures following, to wit:

"That there is no sufficient evidence to warrant the jury in finding that the plaintiff has received any permanent injuries or impairment of his capacity to earn wages, and that because of such serious impairment, if any are found to have followed after the accident, is not sufficient to warrant the jury in finding that the one is the cause of the other."

Second. The court erred in instructing the jury as follows:

"It is not claimed that the plaintiff had any notice or knowledge of the fact that there was any fire in the place when he received his injury or that by the exercise of reasonable care and diligence he could have seen or discovered the fire. The law made it the duty of the defendant to fence its slack pits, and if it did not do so, and as a result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable."

Third. The court erred in further instructing the jury in the words and figures following:

95 "Persons are entitled to the protection which would accrue from a compliance with the statute, and the plaintiff had a right to presume the space between the railroad tracks was not a burning slack pit because it was not fenced. It was the legal duty of the defendant to fence the burning slack, and its omission to do so was negligence."

Fourth. The court erred in further instructing the jury in the words and figures following, to wit:

"The defendant being guilty of negligence, your next inquiry will be whether the plaintiff was guilty of any such negligence as will prevent him from recovery, for it is a principal of law that one injured by the negligence of another cannot recover damages for such injury if by his own negligence he contributed to the injury."

Fifth. The court erred in instructing the jury in the words and figures following:

"Upon the undisputed facts of the case it was not an act of negligence for the plaintiff to visit the defendant's coal mine as he did, and he was not a trespasser thereon in a sense that would excuse the defendant for the acts of negligence by which he was injured, and which I have heretofore adverted to; nor was it an act of negligence for plaintiff, under the circumstances, to run away from the miners. A boy may lawfully run to avoid injury or when frightened, and the fact that the plaintiff was running on the occasion of his injury does not constitute negligence on his part; nor was it negligence in him when he did run not to follow a rough, irregular, and narrow path leading from one railroad track to the other."

Sixth. The court erred in instructing the jury as to damages in the words following:

"He is entitled to compensation for the pain and suffering he endured immediately after the injury, at the time of the injury and afterwards down to the present time, and any pain and suffering that you find from a preponderance of the evidence that he may have to endure in the future."

Seventh. The court erred in refusing to instruct the jury, at request of defendant's counsel, in respect to the character of the evidence to show the impairment of his powers, such request being as follows:

"I suggest the question to which I called your honor's attention as to what, — least, the character of the evidence should be as to the impairment of his powers. I think they ought to be instructed on that point."

And the court's reply:

96 "I think not. I think the general instruction covers the ground."

Eighth. The court erred in taking the question of whether the defendant was or was not guilty of negligence from the jury.

Ninth. The court erred in taking the entire question of whether the plaintiff was guilty of contributory negligence from the jury.

Tenth. The court erred in not leaving the question of whether

there was or was not negligence on the part of the defendant and whether the plaintiff was or was not guilty of negligence to the jury.

The said defendant therefore prays that for and on account of said errors said judgment may be reversed and a new trial allowed.

TELLER & ORAHOOD,
Attorneys for Defendant.

(Indorsed:) 1704. Circuit court. David George McDonald, by his next friend, Mary E. McDonald, *vs.* The Union Pacific Railway Company. Assignment of errors. Filed Sep. 18, 1890. William A. Willard, clerk. Teller & Orahood, attorneys for def't.

Clerk's Certificate.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court and in a certain cause lately in said
97 court pending, wherein David George McDonald, by his next friend, Mary E. McDonald, was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remain on file or of record in my office.

Seal United States Circuit Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 23rd day of September, A. D. 1890.

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Endorsed on cover: Case No. 14,224. Colorado C. C. U. S. No. 224. The Union Pacific Railway Company, plaintiff in error, *vs.* David George McDonald, by Mary E. McDonald, his next friend. Filed October 8th, 1890.

152 US 262

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1893.—No. 224.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

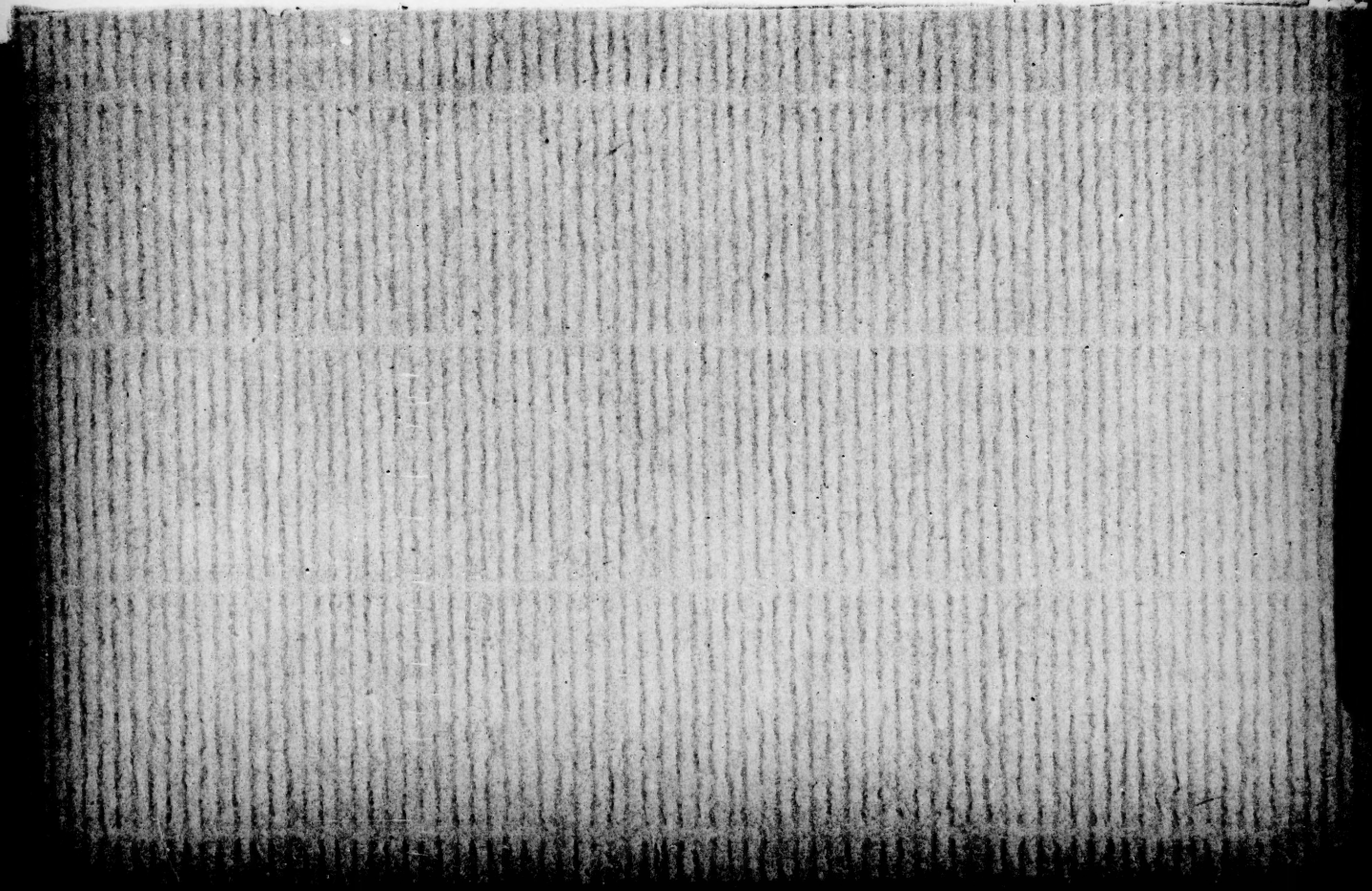
DAVID GEORGE McDONALD, by MARY E. McDONALD, HIS NEXT FRIEND, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF FOR PLAINTIFF IN ERROR.

By JOHN F. DILLON,
SAMUEL SHELLABARGER,
JEREMIAH M. WILSON, and
A. A. HOEHLING, Jr.

Press of McGILL & WALLACE, 1107 E Street N. W.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

DAVID GEORGE McDONALD, by Mary E. McDonald, his next friend, Defendant in Error.

No. 224.

In Error to the Circuit Court of the United States for the District of Colorado.

THE FACTS.

This case comes to this court in error to the Circuit Court of the United States for the District of Colorado.

1. The first petition of the infant, David George Mcdonald, by his next friend, his mother, Mary E. McDonald, against the Union Pacific Railway Company, was filed in the said Circuit Court on the 16th of March, 1885 (*Record, pp. 1 to 4*).

(NOTE.—As this first petition was abandoned by substituting, in lieu thereof, an amended petition (*Record, p. 8*), it is not necessary to make an abstract of such first petition.)

2. The writ of summons was returned served on March 23, 1885 (*Record, p. 6*).

3. A general demurrer was filed to the first petition on April 2, 1885, which was sustained (*Record, pp. 6, 7*).

4. An amended petition was filed on August 3, 1888 (*Record, pp. 7 to 11*), the substance of which is as follows:

(*a*) Avers infancy of plaintiff, guardianship of the mother, citizenship of plaintiff and guardian *ad litem* in the State of Colorado, and that defendant is a corporation created under the laws of the United States, and doing business in Colorado.

(*b*) That the sum in controversy, exclusive of costs, exceeds $500.

(*c*) That defendant, at the times named in said petition, operated a certain railway extending through Weld and Boulder counties, in said State, and in addition thereto was also owning and operating a certain coal mine near the town of Erie, in the county of Weld, which was adjacent to depot grounds of defendant at Erie; that in operating said mine there had been deposited by said railway company, and by the former owners of the mine, a large quantity of coal-slack along and close by said railway track of defendant; that the quantities of the slack so deposited were such as to extend up and down said track several hundred yards, of a width of from three to ten yards; that at some unknown time, but many months prior to the injuries complained of, said coal-slack caught fire and had burned continuously ever since; that at the happening of said injuries, said slack-pile had so burned that a few inches beneath its surface there was a bed of burning coals for nearly the whole extent of said slack-pile, while upon the surface thereof was a covering of ashes, covering the coal for a number of inches and concealing from sight the fire beneath; that except in case of rain, snow, or wind no

smoke or other evidence of the existence of fire was shown, and that the whole mass, owing to said covering, appeared like a bed of dead and fireless ashes without any indication of danger from walking upon or into the same; that this slack-pile, so appearing, was lying in a long and wide pit or trench that had been formed on the east side of the main railroad track in excavating and throwing up the dirt for said track; that said bed of coals was far-reaching in depth, and that cattle, in crossing the same, had sunk therein and burned before they could be extricated; that said slack-pile, burning as aforesaid, and covered and concealed as aforesaid, lay alongside of the main railway track of defendant between the shaft-house on said coal mine and the depot building in said town of Erie, and the burning portion thereof, concealed and covered as aforesaid, came within a few feet of the platform of said depot, so that passengers, in strolling around the depot grounds, or passing to the side of the track, were liable at any moment to be engulfed in this concealed furnace; that said slack-pile, in the condition aforesaid, was upon the lands of the defendant company, and that, for a long time before the injuries complained of, defendant had full knowledge of the existence of the same, and of the fact that, except in case of rain, snow, or winds, it gave no indication of the existence of fire; that the said town of Erie, at the times aforesaid, contained, and now contains, a population of from five to seven hundred people, a large percentage of whom are children, and many cattle feed upon the commons, and that the locality of said slack-pile was frequented by adults and children living in and about and visiting the said town of Erie, as well as cattle, and that all this was done with the full consent of defendant; that defendant had, at the times aforesaid, full knowledge of the condition of the said slack-pile; that it knew of the bed of burning coal beneath; that

the same was covered with ashes, and that, except in case of rain, snow or winds, no indication was given of the presence of fire; that defendant knew that said locality was frequented by adults and children who lived in and about and visited the town of Erie, and that cattle grazed thereabouts, and that a person or beast ignorant of its condition was liable to go upon or into the same, unsuspecting any danger therefrom.

(*d*) That, because of the public place wherein the said slack-pile was, and its locality being frequented by adults and children of said town of Erie, and those visiting the same, and the cattle grazing thereabouts, and because of the fire therein being concealed as aforesaid, it became and was the duty of the defendant, long before, and at the time of, the happening of the injuries complained of, either to have extinguished the said fire, or to have removed the same, or to have fenced or enclosed the said slack-pile, or to have put some sufficient sign and warning notifying the public of the danger of going in or upon the same, yet the said defendant company, unmindful of its duty in the premises, did, at the time of the happening of the injuries complained of, and had for a long time before the happening of said injuries, negligently and carelessly permitted the same to be and remain in said public place, without any sign or notice to the public of its dangerous character, and to be and remain in said public place without any enclosure or barrier to prevent unsuspecting adults or children from going in and upon the same, or guards to turn away cattle, though it is true that, since plaintiff received the injuries complained of, defendant has enclosed the entire slack-pile with a good and substantial wire fence.

(*e*) That plaintiff, on September 3, 1884, was a child of not over twelve years of age; that he had just gone to Erie and vicinity with his mother for the first time, and

that he was, at the time of the happening of the injuries complained of, wholly ignorant of the condition of said slack-pile, and was ignorant of the fact that it contained any fires whatsoever; that there were no signs to indicate that said fire existed therein, and that there was no rain or wind on said day, nor had there been for several days prior thereto, and there was none for several days thereafter; neither was there any snow, or any other condition of the weather, or any condition whatever that would indicate the presence of said fire, either then or for several days prior thereto and thereafter.

(*f*) That, at the date last mentioned (September 3, 1884), plaintiff was in the neighborhood of said depot, and at or near the shaft of the mine of said company, and that he was there by the permission and consent of defendant and at defendant's request; that, while there, some boys who had been working on said mine, and were in the employment of defendant, emerged from said shaft, and, seeing the plaintiff, the boys, as if to frighten or injure plaintiff, ran after him, saying, "Let's grease him!" and the said plaintiff, not knowing them, and fearing and believing they might be seeking to injure him, started and ran from them towards the said town of Erie, where his mother was, and in so doing was compelled to run across the said slack-pile; that, for the reasons aforesaid, not suspecting or fearing, or having cause to suspect or fear, danger or fire from said slack pile, and which appeared to be but dead and lifeless ashes, and which was nearly level with the surrounding surface of the ground, and being pursued by said boys, and without fault or neglect on his part, continued straight forward on a run towards said town of Erie, and sought to cross the said slack-pile; that when his feet touched the same they sank into it for some considerable distance, the same being soft and yielding, and, because

of his feet so sinking, he, without fault on his part, was thrown forward upon his hands and face into and upon said slack pile; that, upon being so thrown forward, his hands and arms sank through said ashes and into the bed of burning coals aforesaid, and his face was partly buried in the same, and thereby and because thereof his hands, arms and face were badly burned, and because thereof his hands and arms have become weakened and in part disabled, and his hands, arms and face were badly scarred and disfigured, and his general health has been greatly and permanently impaired, and his kidneys have become permanently weakened and diseased, and he suffered great pain and torture, and was confined to his bed thereby for a long period of time, and was thereby disabled for a long time from the use of his hands in any way whatsoever.

(*g*) That because of the premises plaintiff has been damaged in the sum of fifteen thousand dollars.

5. On August 16, 1888, defendant filed a general demurrer to said amended petition, which was overruled (*Record, pp. 11, 12*).

6. On March 21, 1889, defendant filed an answer, which was a general denial; and, further answering, defendant alleges that any injury that may have been received by the plaintiff, as in said complaint alleged, was caused by and through his own negligence, default and want of care of the mother of said plaintiff, and not by and through any act, default, or negligence on the part of defendant (*Record, pp. 13–16*).

7. A general replication was filed by the guardian *ad litem* on May 29, 1889 (*Record, pp. 16, 17*).

8. The jury trial commenced on the 27th of May, 1889, in said Circuit Court (*Record, p. 17*), and proceeded from

day to day until July 12, 1889, when verdict for plaintiff was returned in the sum of $2,500 (*Record, p. 18*).

9. On July 12, 1889 (*Record, p. 18*), on motion of the defendant, the court granted a new trial.

10. On December 12, 1889, on motion of plaintiff, leave was granted to amend the amended petition, which amendment was then filed by plaintiff. This amendment alleged that "the said coal slack was not spread out in thin layers on the ground, but was taken out of the said mine and piled upon the surface of the ground in such quantities as to produce spontaneous combustion," and that defendant knew of such fact (*Record, pp. 19, 20*).

11. The second trial commenced on June 16, 1890 (*Record, p. 20*), and continued from day to day until June 18, 1890, when a verdict for plaintiff and judgment thereon was rendered for $7,500 (*Record, p. 21*).

12. On June 26, 1890, a motion for a new trial was made by defendant, and was denied. Thirty days were given within which to file a bill of exceptions (*Record, pp. 22, 23*).

13. The bill of exceptions appears in the Record, beginning at page 23, and extends to page 58. Its contents are specifically stated in the Index to the Record on page 11.

14. The evidence, with the exception of that of plaintiff, is not fully embodied in the Record, it containing simply a statement of the matters which the evidence tended to prove. As to the plaintiff's evidence, there is what seems to be a full statement of his testimony (*Record, pp. 31–44, inclusive*).

15. The instructions given by the court to the jury, on

its own motion, are set forth in the Record at pages 50 to 54. On page 54, folios 81–2, at the end of said instructions to the jury, "counsel for defendants excepts "to the refusal of the court to instruct that there was not "sufficient evidence as to the question of serious or "permanent injury, and leaving the question of serious "impairment to them, and also to the instruction not "given, and to the giving of the instruction as to all "question connected with permanent injury, and to the "withdrawing of the question of negligence of defendant "and contributory negligence of plaintiff from the jury."

16. On pages 62 to 64 is the assignment of errors, made September 9, 1890, in said Circuit Court, in which the reversal of the judgment in that court was asked. We here adopt said assignment of errors as the assignment on behalf of the plaintiff in error in this court, and which is as follows:

Assignment of Errors.

1. The court erred in refusing to give the instruction asked by the defendant, which instruction, as asked, was in the words and figures following, to wit:

"That there is no sufficient evidence to warrant the jury in finding that the plaintiff has received any permanent injuries or impairment of his capacity to earn wages, and that, because of such serious impairment, if any are found to have followed after the accident, is not sufficient to warrant the jury in finding that the one is the cause of the other."

2. The court erred in instructing the jury as follows:

"It is not claimed that the plaintiff had any notice or knowledge of the fact that there was any fire in the place when he received his injury, or that, by the exercise of reasonable care and diligence, he could have seen or dis-

covered the fire, The law made it the duty of the defendant to fence its slack pits, and if it did not do so, and as a result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable."

3. The court erred in further instructing the jury in the words and figures following:

"Persons are entitled to the protection which would accrue from a compliance with the statute, and the plaintiff had a right to presume the space between the railroad tracks was not a burning slack-pit, because it was not fenced. It was the legal duty of the defendant to fence the burning slack and its omission to do so was negligence."

4. The court erred in further instructing the jury in tfie words and figures following, to wit:

"The defendant, being guilty of negligence, your next inquiry will be whether the plaintiff was guilty of any such negligence as will prevent him from recovery, for it is a principle of law that one injured by the negligence of another cannot recover damages for such injury if by his own negligence he contributed to the injury."

5. The court erred in instructing the jury in the words and figures following:

"Upon the undisputed facts in the case it was not an act of negligence for the plaintiff to visit the defendant's coal mine as he did, and he was not a trespasser thereon in a sense that would excuse the defendant for the acts of negligence by which he was injured, and which I have heretofore adverted to, nor was it an act of negligence for plaintiff, under the circumstances, to run away from the miners. A boy may lawfully run to avoid injury, or when frightened, and the fact that the plaintiff was running on the occasion of his injury does not constitute negligence on his part, nor was it negligence in his, when he did run, not to follow a rough, irregular, and narrow path leading from one railroad track to the other."

6. The court erred in instructing the jury as to damages in the words following:

"He is entitled to compensation for the pain and suffering he endured immediately after the injury, at the time of the injury, and afterwards down to the present time, and any pain and suffering that you find, from a preponderance of the evidence, that he may have to endure in the future."

7. The court erred in refusing to instruct the jury, at the request of defendant's counsel, in respect to the character of the evidence to show the impairment of his powers, such request being as follows:

"I suggest the question, as to which I called your honor's attention, as to what—at least, the character of the evidence—would show about the impairment of his powers. I think they ought to be instructed on that point."

And the court's reply:

"I think not. I think the general instruction covers the ground."

8. The court erred in taking the question of whether the defendant was or was not guilty of negligence from the jury.

9. The court erred in taking the entire question of whether the plaintiff was guilty of contributory negligence from the jury.

10. The court erred in not leaving the question of whether there was or was not negligence on the part of the defendant, and whether the plaintiff was or was not guilty of negligence, to the jury.

11. The court erred in instructing the jury that the only disputed issue in the case was the question of damages—this by charging it that "*the* disputed issue in the

case is the question of damages—what damages you shall award."

12. The court erred in refusing to grant a new trial.

13. The court erred in entering said judgment.

14. And for other errors appearing in the Record.

BRIEF.

In entering upon the present argument, we will first consider specifically the matter of negligence of plaintiff in error in failing to enclose its slack-pile with a fence, in obedience to the statute, and will afterwards more fully consider the other questions of negligence which the court withdrew from the consideration of the jury.

I.

THE COURT BELOW SHOULD HAVE SUBMITTED TO THE JURY THE QUESTION OF NEGLIGENCE ON THE PART OF THE DEFENDANT COMPANY. ITS FAILURE TO DO SO, AND, INSTEAD THEREOF, TO CHARGE THAT THE SAID DEFENDANT COMPANY WAS GUILTY OF NEGLIGENCE AS MATTER OF LAW FOR WHICH IT WAS LIABLE TO THE PLAINTIFF, WAS SERIOUS ERROR, FOR WHICH THE JUDGMENT BELOW SHOULD BE REVERSED.

As stated by the court in its charge to the jury, the foundation of the plaintiff's action is the charge of negligence against the defendant. The court said (*Record, pp. 51, 52*):

"The alleged negligence of the defendant consists in erecting and maintaining a burning pit of slack coal at a place and under conditions which made it dangerous to persons not having previous knowledge of its exist-

ence, and neglecting to fence the same, as required by the statutes of this State. * * * The law made it the duty of the defendant to fence its slack pit, and if it did not do so, and as a result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable. Persons are entitled to the protection which would accrue from a compliance with the statute, and the plaintiff had a right to presume the space between the railroad tracks was not a burning slack-pit because it was not fenced. It was the legal duty of the defendant to fence the burning slack, and its omission to do so was negligence. The defendant being guilty of negligence, your next inquiry will be," etc.

The defendant duly excepted to the charge of the court (*Record, p. 54*).

The statute of the State of Colorado referred to in the charge of the court above quoted is as follows:

"SEC. 19. (1.) That the owners or operators of coal mines from which fine or slack coal is taken and piled upon the surface of the ground in such quantities as to produce spontaneous combustion shall fence said ground in such manner as to prevent loose cattle or horses from having access to such slack-piles.

"SEC. 20. (2.) All owners of lands having abandoned coal pits or shafts on the same of sufficient depth to endanger the life of cattle, horses, or other stock shall fence or fill said pits or shafts in such a manner as to afford permanent protection to all such stock endangered thereby.

"SEC. 21. (3.) Every person violating sections one (1) and two (2) of this act shall be deemed guilty of a misdemeanor and shall be fined in a sum not less than twenty (20) dollars nor more than one hundred (100) dollars, to be collected as other fines are collected, and shall be further liable to any party injured thereby in the amount of the actual injury sustained."

General Statutes of Colorado, 1883, chap. XVI, page 169.

After the demurrer to the original complaint was sustained, the plaintiff apparently felt the necessity of bringing to his aid (however uncertain and unreliable it might be) this statute of the State on the subject of fencing slack-piles, for, when he amended his complaint, he interspersed it with allegations as to the dangerous condition of the slack-pile so far as cattle were concerned; that "cattle in crossing the same had sunk therein and "burned before they could be extricated;" that many cattle feed "upon the commons, and that the locality of "the said slack-pile was frequented by the adults and "children as well as cattle;" that "a person or beast "ignorant of its condition was liable to go upon or into "the same, unsuspecting any danger therefrom."

But this effort proved futile, and although the demurrer to this amended complaint was overruled, yet after a trial of the issues the court granted the defendant's motion for a new trial. The plaintiff then further pursued his remedy of amendment, and this time incorporated in his amended complaint an amendment which brought in the language of the statute theretofore omitted, the allegation being that "the said coal slack "was not spread out in thin layers on the ground, but "was taken out of the said mine * * * and *piled* "*upon the surface of the ground in such quantities as to pro-* "*duce spontaneous combustion.*"

We shall show hereafter, as we believe, that the plaintiff was guilty of negligence on his own part, but for which he would not have been injured (which question should have been submitted to the jury), and that he was a trespasser upon the lands of the defendant company, and was not there at the defendant's request. But here we purpose to discuss the question of the propriety or impropriety of the assumption as a legal conclusion, that because of the failure of the defendant company to fence its slack-pile, as required by the statute above quoted, in

order "to prevent loose cattle or horses from having access" to the same, it was such negligence as would of itself give the plaintiff a right of action for personal injury. We hope to enforce with sufficient strength our contention that, under the circumstances of this case at least, the question as to the negligence of the defendant in failing to comply strictly with the statute was one which should have been submitted to the jury for their consideration, and submitted to them only as an evidence of negligence, which they should have been instructed to weigh carefully in connection with the other proofs.

The whole purpose and intent of the first section of the statute upon which the court below placed so much reliance for his authority to decide the question of negligence, was merely to prevent "loose cattle or horses from having access to such slack-piles," and to provide penalties for violation thereof, one penalty being a liability "to any party *injured thereby* in the amount of the actual injury sustained."

The precise point as to whether such a failure to comply strictly with a statute is negligence as matter of law, or only evidence of negligence which should be submitted to the jury for their consideration and which properly belongs to their province, has been many times decided, and the doctrine so conclusively established that we need cite but few cases to convince this court that the trial court in the present case committed a grave and serious error in withholding from the jury the consideration of the question of defendant's negligence, for which error alone the judgment must be reversed.

In *Cook* v. *Johnston* (58 Mich., 437), the trial court charged the jury that a violation of the city ordinance requiring ashes to be kept in metallic or other incombustible vessels was negligence in law, for which the defendant would be liable. But the Supreme Court held that "this doctrine is not maintainable as stated."

In *Cordell* v. *New York Central, &c., Railroad Co.* (64 N. Y., 535) the trial court charged, among other things, that as matter of law, defendant having failed to ring the bell or sound the whistle, as the statute required, when crossing a public highway, it was guilty of negligence. It seems not to have been conclusively proved that the crossing in question was a "traveled public road" within the meaning of the general railroad law. Andrews, J., said:

"The correctness of the charge that the omission by a railroad corporation to ring the bell or sound the whistle when the statute requires it to be done is legal negligence is supported by authority (*Renwick* v. *N. Y. C. R. R. Co.*, 36 N. Y., 132; *Gorton* v. *Erie Railway Co.*, 45 *Id.*, 660). But unless the crossing was a highway, in respect to which the statutory duty existed, the omission to give the signals was not as matter of law negligence. It was, and is, the duty of a railroad company to use due care at all times in running and managing its trains, which it owes alike, though it may be in different degree, to passengers and persons rightfully upon its track, and ordinary care and prudence may require the giving of signals to warn persons upon the track in danger of being injured by it, although there is no public highway at the place; and the omission to give the warning, if the jury should find that due care and caution required that it should be given, would subject the corporation to liability for injury caused by the omission. But it would be error in such a case to charge that in law such omission was negligence. It would be for the jury to determine the question as one of fact under all the circumstances proved."

It will be noticed that the court denied the propriety of assuming as matter of law that a person could be chargeable with negligence for failure to comply with a statutory requirement in a case where the language of the statute did not precisely and exactly cover the particular circumstances. In the present case it seems from the very wording of the statute that the legislature did

not contemplate that any danger could arise, so far as a thinking human being was concerned, because a slack-pile might be allowed to remain unfenced, but the design evidently and undoubtedly was to protect the owners of dumb animals—of animals incapable of reasoning, without the power of intelligent observation or the ability to acquire information—by providing an easy remedy in case their loose cattle or horses should stray upon a burning slack-pile and be injured by reason thereof. To say that this statute of itself gives a remedy to a person who might be injured by falling upon an unfenced slack-pile, and that failure to comply with its provisions is in every such case negligence as matter of law, gives to the evident intention of the legislature a serious wrench—stretches the language far beyond its true and natural meaning, and can not well be sustained by any fair or careful reasoning.

Whether in this particular case such failure of the defendant to comply with the statute was or was not negligence, was, as we maintain, clearly a question for the jury to determine. It was not for the court to presume that the defendant company had been negligent as matter of law. This failure of the defendant company to comply with the requirement of the statute was at best evidence of negligence, and like other evidence should have been submitted to the jury. Judge Brewer decided on demurrer to the original complaint (*35 Fed. Rep., 38*) that the defendant company, under all the facts, was not chargeable with negligence in leaving the slack-pile unfenced, which proposition we still maintain; but if any court should be of the opinion that the company was negligent, yet there is no escape from the doctrine that its failure to comply with the requirements of the statute was clearly and undoubtedly only evidence of negligence, and thus a question for the jury to consider.

Another New York case on this point, and a strong

one in support of our view, is *Knupfle* v. *Knickerbocker Ice Co.* (84 N. Y., 488). This action was brought to recover damages for the death of a child alleged to have been caused by the defendant's negligence. It appeared that the driver of one of defendant's ice wagons, which was drawn by mules, left them standing in the street, unfastened and unattended, while he went into a store. The deceased, a boy about five years old, was being drawn upon the sidewalk, in a small wagon, by another boy about his own age, who, as he got opposite the ice wagon, let the tongue of the little wagon drop, and it ran in between the mules and the ice wagon. The mules started up, and a wheel of the ice wagon passed over the boy and killed him. The plaintiff offered in evidence an ordinance of the city prohibiting the leaving of horses attached to vehicles in a street without a person in charge, or without being secured to a tying post. The court said:

"One of the principal questions litigated upon the trial of this action related to the alleged negligence of the driver of the defendant's team in leaving the horses untied in the street, which, it was claimed, was the cause of the death of the intestate. Among other evidence to establish such negligence, the plaintiff offered and introduced in evidence, against the objection of the defendant, an ordinance of the city of Brooklyn, prohibiting the leaving of any horse or horses attached to a vehicle standing in any street without a person in charge, or without being secured to a tying post. We think there is no question as to the admissibility of such testimony under the decisions of this court, and the exception taken to the ruling in this respect can not be upheld.

"A more serious question arises as to the effect to be given to the evidence referred to. At the close of the charge, plaintiff's counsel requested the judge to charge the jury that a violation of an ordinance of the city is necessarily negligence; and the judge replied: 'It is; I have so told the jury; it is negligence;' and the defendant's counsel excepted. We think there was error in the

charge thus made, and that the judge went too far in holding that a violation of the ordinance was negligence of itself."

The court then reviewed previous New York cases on the subject, and thus concluded:

"The result of the decisions, therefore, is, that the violation of the ordinance is some evidence of negligence, but not necessarily negligence. The judge not only assented unqualifiedly to the request made, but he also said that it was negligence; and thus went further than to hold, within the cases cited, that it was evidence of negligence."

It may be observed that in the case just cited the terms of the ordinance could more easily be held to sustain the ruling of the trial court than a statute like the one in the present case the language of which had reference to another and entirely different condition of affairs than was shown to have existed.

See, also, *Harty* v. *Central R. R. Co. of N. J.*, 42 N. Y., 468;

Hanlon v. *South Boston R. R. Co.*, 129 Mass., 310;

Billings v. *Breinig*, 45 Mich., 65;

Clark v. *Boston, &c., R. Co.*, 64 N. H., 323;

Davis v. *Guarnieri*, 45 Ohio St., 485, and cases cited;

Buswell on Personal Injuries, §§ 141–142, and cases in notes.

We need refer further only to the case in this court of *Hayes* v. *Michigan Central R. R. Co.* (111 U. S., 228) where the plaintiff, a child of eight or nine years, was injured on the track of the railroad, the company having failed to comply with an ordinance of the city requiring a fence to be erected between the track and a park. The opinion of the court, exactly applicable to the present case, is as follows:

"It is said, however, that it does not follow that whenever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of *Atkinson* v. *Newcastle Water Works Company* (L. R., 2 Exch. Div., 441) as authority for that proposition, qualifying as it does the broad doctrine stated by Lord Campbell in *Couch* v. *Steel* (3 E. and B., 402). But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited, that whether such an action can be maintained must depend on the 'purview of the legislature in the particular statute, and the language which they have there employed,' we think the right to sue, under the circumstances of the present case, clearly within its limits. In the analogous case of fences required by the statute, as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. * * * The evidence of the circumstances showing negligence on the part of the defendant, which may have been the legal cause of the injury to the plaintiff, according to the rule established in *Railroad Company* v. *Stout* (17 Wall., 657) and *Randall* v. *B. and O. Railroad Company* (109 U. S., 478) should have been submitted to the jury."

We submit, therefore, that according to the doctrine established by the decisions of this and other courts the trial judge in the case at bar committed an error in not submitting to the jury the question of the failure to comply with the statute, as evidence of negligence, and in deciding as matter of law that such failure was negligence, and that therefore the judgment should be reversed.

II.

Extent to which Case was Taken from the Jury.

In now further presenting the matters of assigned error, in withdrawing from the jury questions of fact that were in issue in the case, it is appropriate to point out from the Record the particulars of such withdrawals.

We have presented a reference to the withdrawal, by the court, of the question of negligence in regard to the failure of plaintiff in error to fence the slack-pile, as provided by the statute, and will, of course, not repeat that. The following are examples, found in the charge to the jury (*R., pp. 50, 54*), of matters as to which the court took questions of fact, which were put in issue by the pleadings, and evidence from the jury, in addition to the withdrawal of said question of negligence in failing to fence or enclose said slack-pile:

1. The court (*R., p. 52, fol. 79*) states to the jury as follows:

"It is not claimed that the plaintiff, * * * by the exercise of reasonable care and diligence, could have seen or discovered the fire."

On the contrary of this, it will be seen at page 13 of the Record, folio 20, that the answer states, in regard to the plaintiff's ability to discover the fire, if there was fire, as follows:

"Denies that, if there was any fire, that no smoke was emitted or any evidence of its existence shown, as stated in said complaint; denies that the same appeared like a bed of dead and fireless ashes; denies that there were no indications that there was no danger to be apprehended from walking upon or into the same."

2. At page 52, folio 79, of the Record, the court enumerates the following particulars as matters in which it

instructs the jury that the plaintiff was not negligent, and that these specifications were true under the undisputed facts of the case, namely:

(*a*) That it was not negligence to visit defendant's coal mine as plaintiff, below, did.

(*b*) That plaintiff was not a trespasser in making said visit.

(*c*) That it was not negligence to run away from the miners, as was done.

(*d*) That it was not negligence not to follow exactly a rough, irregular, and narrow path.

(*e*) Nothing in the surroundings to inform him that he would incur any risk or danger in not keeping in path.

It will be seen that each one of these alleged facts declared not to constitute negligence, or to be evidence thereof, is disputed.

For example, is disputed by the answer, and, in part, at least, by the evidence: The answer (*R., p. 14, folio 22*) "denies that any of the acts stated in said complaint "were done with the consent or knowledge of the defend-"ant;" again (*R., p. 15, fol. 23*), "denies that he was there "by the permission or consent of defendant or at defend-"ant's request," and (*R., p. 15, fol. 24*) "alleges that any "injury that may have been received by plaintiff, as in "said complaint alleged, was caused by and through his "own negligence, default, and want of care, and the "negligence, default, and want of care of the mother of "said plaintiff, and not by and through any act, default, "or negligence on the part of defendant."

Instead of the fact of his presence there being indisputably no trespass it will be observed that, in addition to what appears in the pleadings, it appears in the evidence for the defendant (*R., p. 49, fol. 75*), as follows:

In the testimony of Max Greenfield it is stated:

"Saw the boy there at the time he was hurt; was up in the weigh office; saw the boy come up from below; heard Mr. Miller calling to some one to go away—that that was no place for him—there was danger—to get down. He would not go. I looked, and we both called to him to go away from there and get down. He finally left."

Again, W. K. Miller, a witness for defendant, testifies (*R., p. 50, fol. 76*):

"Was there the day the accident happened; saw the boy there in the morning about between ten and eleven; * * * it was the boy that was burned that afternoon; he was on top where I was dumping coal; *I told him to get off;* this was a short time before the accident."

And, besides this, the plaintiff himself, in his testimony (*R., p. 32, fol. 51*), admits that he was *ordered to get away from there, and that he stayed around after that for some ten minutes.*

In regard to the two points as to which the court says the facts were not negligence, to wit, the point that he was not negligent in the way he ran from the miners, and was not negligent in failing to follow the rough, irregular path from one railroad track to the other, each of these propositions are not only not undisputed but are distinctly controverted.

The plaintiff, in his testimony (*R., p. 39, fol. 61*), speaking of the time when he fell into the slack-pit, says:

"I think I was running with my face that way—*looking back of where I run*—just about as somebody yelled. I gave a quick sort of *look around* that way and fell."

He adds:

"*I didn't say my face was in front of me*" (speaking of the time he fell).

"Q. Here you said you was looking backwards to see the boys, and somebody yelled. You gave a quick sort

of look around; in that way you fell. Do you say that is true now?

"A. Well, *I think it is as far as my knowledge goes.*"

As to the point which the court told the jury that plaintiff was not negligent in failing to follow the path which he was on, the following facts are to be noted:

At page 31, folio 49, of the Record, on cross-examination, J. W. Makin swore that *the path on which the boy said he was running was a plainly-defined path, and was used by the miners in going to and from town to the shaft.*

In the testimony of Max Greenfield, on behalf of the defendant, it is stated that the path was "an ordinary foot-path" (*R., p. 49, fol. 75*).

And then, also, in regard to the question whether plaintiff *was on the path before he fell*, or, on the contrary, was taking "a short cut" to the path when he fell into the slack-pit, the testimony of the plaintiff (*R., pp. 39, 40, fol. 61*) is as follows:

"Q. Now, *were you on the path before you fell into the fire or not?*"

"A. Well, there is another point. *I think I was;* to all probability I was. * * * Well, it is just this way: there is a jutting rock in this thing where it pointed out from the slack-pile. You have to go around a sort of sharp corner there. There is the place I think I fell.

"Q. You missed the path there, then?

"A. I think I did, sir.

"Q. *About the time you fell you were looking around towards the boys, were you?*

"A. Well, *I guess I was.* I could not say exactly.

In regard to these five points—*a*, *b*, *c*, *d*, and *e*—as to which the court says the facts were undisputed, and showed no negligence, we have not alluded to them for the purpose of showing that there was or was not, as a matter of law or a matter of fact, negligence; but allude to them only for the purpose of showing that they belong to the class

of disputed facts which the defendant was entitled to have submitted to the jury, instead of having them taken from the jury, and the jury instructed that they showed no negligence on the part of the plaintiff and were "undisputed."

The next subject-matter withdrawn from the jury, and upon which we maintain that the jury was entitled to pass, is really the entire subject-matter in suit, for in this the court, in legal effect, withdrew the whole case from the jury and decided it, with the exception that it left it to the jury to pass upon the extent of the damages.

At page 52, folio 79 of the Record, the court said to the jury as follows:

"The *disputed issue* in this case is the question of damages—what damages you shall award."

This is precisely equivalent to saying to the jury that *nothing else* was in issue in the case except how much the plaintiff below was entitled to recover. And this idea is unmistakably impressed upon the attention of the jury by other parts of the charge. For example, the court (*R., p. 54, fol. 81*) says to the jury:

"Consider all the testimony, and, in the light of all the testimony on the subject of these injuries and their extent, *determine what is a fair, just compensation to the plaintiff for the injury he has sustained; that will be the amount of your verdict.*"

And again (*id.*) the court says:

"I say to you again, gentlemen, you are the judges of facts; you give such weight to the testimony of each witness as you deem it entitled to. It is from that evidence you *must determine for yourselves the character of these injuries and the extent to which the plaintiff is entitled to recover.*"

It will be observed that these last quotations from the charge of the court are not coupled with any hypotheti-

cal statement, such as, "if you find the defendant guilty "of negligence," or "if you find the plaintiff was not "guilty of contributory negligence, then you will find so- "and-so as to the amount of the recovery." But on the contrary, the court *assumes*, in each and all of these instructions, that the verdict must be for the plaintiff.

The result of what we have now pointed to is clearly this, that the court took from the jury, not only the question as to whether there was negligence in the matter of not fencing or enclosing said slack-pile, but also the question whether the plaintiff below, in being, as he was, on the premises of the defendant, was or was not a trespasser—whether he was guilty of contributory negligence in refusing to leave the premises when ordered to leave—whether he was negligent in failing to follow the foot-path—whether he was negligent in rapidly running forward, and, at the same time, not observing his footsteps, but looking back as he ran—whether he was negligent in failing to discover the presence of fire and the dangerous character of the slack-pile; and, also, every other question in the case, save the question of the amount of the recovery.

Now, we submit that it is hardly possible to deny that these matters, so taken from the jury, involve questions of fact as to which fair-minded men might reach the conclusion that there was, on the part of the plaintiff below, and his mother, contributory negligence; or that the defendant, below, was not negligent.

III.

On what Questions the Jury Must Pass.

We therefore proceed to state from the authorities what tests are established by the law of this and other courts as to when a transaction becomes negligence in law, upon which the court may pass without submitting

it to the jury, and in what class of cases this is not permissible.

It is appropriate, at the outset, to remark that the same tests and rules determine what is contributory negligence as determine the question of negligence on the part of a defendant. As to this it is stated in 2 Thompson on Negligence (see notes at bottom of page 1178):

"Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the *same* circumstances, and subject to the *same* limitations as the question whether there has been negligence on the part of the defendant."

To this the author cites in note 9:

Jalie v. *Cardinal*, 35 Wisconsin, 118, 129;
Seigle v. *Eisen*, 41 California, 109;
Park v. *O'Brien*, 23 Connecticut, 339;
Railroad Co. v. *Brady*, 17 Kansas, 380;
Brown v. *Railroad Co.*, 58 Maine, 384;
Express Co. v. *Nichols*, 32 New Jersey Law, 165.

Therefore, any authority that fixes a test as to when the conduct of a defendant is negligent, as a matter of law, and may be taken from the jury and decided by the court, is equally applicable to the matter as to when such contributory negligence is established as that it may be taken from the jury. We may, therefore, present the authorities that give the rule as to each of these classes of cases.

In Cooley on Torts (2d edition), top page 804, side page 670, the test is thus stated:

"The proper conclusion seems to be this: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite safe in saying that the law deduced the conclusions accordingly. If the facts are not ambiguous, and there is no room for

two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute."

The author then puts a number of cases of extreme negligence where there could be in fact no difference of opinion as to the matter of negligence, and adds:

"Concerning such cases, no one should be in doubt. But, in the great majority of cases, the question of negligence on any given state of facts must be one of fact."

The author then cites (note 1, p. 805) an immense number of cases, commencing with the case of *Railroad Co.* v. *Stout* (17 Wall., 657).

In this case of *Railroad Co.* v. *Stout* (17 Wall., 657), the court presents a considerable line of authorities, all sustaining the proposition laid down in the syllabus as follows:

"Though it is true, in many cases, that where the facts of a case are undisputed, the effect of them is for the judgment of the court and not for the decision of the jury; this is true in that class of cases where the *existence* of such facts comes in question, rather than where *deductions or inferences* are to be made from them. And, whether the facts be disputed or undisputed, *if different minds may honestly draw different conclusions from them, the case is properly left to the jury.*"

The court quotes, with approval, the following from 2 Redfield on the Law of Railways (p. 664):

"In Redfield, on the Law of Railways, it is said: 'And 'what is proper care will be often a question of law, 'where there is no controversy about the facts. But ordi- 'narily, we apprehend, where there is *any testimony* tend- 'ing to show negligence, it is a question for the jury.'"

The court also cites with approval the case of *Patterson* v. *Wallace* (1 McQueen's House of Lords Cases, 748),

where the House of Lords reversed the court below, and held that the question was one for the jury.

The court also cites the case of *Mangam* v. *Brooklyn Railroad Co.* (38 New York, 11 Tiffany, 455). In that case the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a non-suit, holding that these facts established negligence in those having the custody of the child. The Court of Appeals of the State of New York held that the case should have been submitted to the jury, and set aside the non-suit.

This court also cites with approval the case of *Detroit, &c., Railroad* v. *Van Steinburg* (17 Michigan, 99), and says of this case that in it "the cases are largely exam-"ined, and the rule laid down, that when the facts are "disputed, or when they are not disputed, but *different* "*minds might honestly draw different conclusions from them,* "the case must be left to the jury for their determina-"tion."

In 2 Thompson on Negligence (p. 1179), the test as to when a question may, and when it may not, be withdrawn from the jury is thus stated:

"The rule briefly is, that, where the facts are undisputed, or where but one reasonable inference can be drawn from them, the question is one of law for the court; but, where the facts are left by the evidence in dispute, or where fair minds *might draw different conclusions* from them, it must go to the jury, to resolve the dispute in the one case, or to draw the inferences in the other."

Then, again, the same author (p. 1236) states this matter as follows in section 11, chapter 24:

"It should be remembered, however, that the cases in which the question can thus be withdrawn from the jury are comparatively rare.

"It is frequently stated, that when the facts are undis-

puted or conclusively proved, the question of negligence is to be decided by the court. A better opinion, however, would seem to be that, in order to justify the withdrawal of the case from the jury, the facts of the case should not only be undisputed, *but the conclusion to be drawn from those facts indisputable.*" (Citing *McLain* v. *Van Zandt*, 7 Jones & Sp., 347.) "Whether the facts be disputed or undisputed, if different minds may *honestly* draw different conclusions from them, the case should properly be left to the jury."

To this, in note 1, page 1237, the author cites:

Railroad Co. v. *Stout*, 17 Wallace, 657;
Fernandez v. *Sacramento City Railroad*, 4 Cent. L. J., 82;
Detroit, &c., Railroad v. *Van Steinberg*, 17 Michigan, 99;
The State v. *Railroad*, 52 New Hampshire, 529;
Gaynor v. *Old Colony, &c., Railroad*, 100 Massachusetts, 208;
McGrath v. *Hudson River Railroad*, 32 Barber, 144;
Bridges v. *North London Railroad*, L. R. 7, H. L., 213;
Beers v. *Housatonic Railroad*, 19 Connecticut, 566;
Vinton v. *Schwab*, 32 Vermont, 612;
Penn. Canal Co. v. *Bently*, 66 Pennsylvania State, 30;
Wyatt v. *Citizens' Railroad*, 55 Missouri, 485;
Norton v. *Ittner*, 56 Missouri, 541;
Stoddard v. *St. Louis, &c., Railroad*, 65 Missouri, 514;
Jenkins v. *Railroad Co.*, 2 Disney, 49.

As to the above-cited case of *Detroit, &c., Railroad Co.* v. *Van Steinberg* (17 Michigan, 99) and which is approved by this court in 17 Wall., 665, the author says, speaking of the reasons why but few cases as to negligence should be withdrawn from the jury:

"The reasons for this are nowhere better stated than in the language of Cooley, Chief Justice, in the case of *Detroit, &c., Railroad Co.* v. *Van Steinberg*, 17 Mich., 99."

In Note 1, page 94, of 4 American and English Encyclopædia of Law, is the following, quoted with approbation from 1 Thompson on Negligence.

"When the question rests upon a state of facts upon which reasonable men may fairly arrive at different conclusions, the fact of negligence can not be determined until one or the other of those conclusions *has been drawn by the jury.* The inferences to be drawn from the evidence must be *certain and incontrovertible* or they can not be decided by the court. Negligence can not be conclusively established by a state of facts upon which fair-minded men may well differ."

This, it seems, is a quotation from the opinion of Chief Justice Cooley in the above-cited case of *Detroit, &c., Railroad Co.* v. *Van Steinberg*, and is supported by a very large number of authorities given in said Note 1, page 94, 4 American and English Encyclopædia of Law.

The same thing is held in the case of *Thurber* v. *Railroad Co.* (60 New York, 326–331). On the present point the head note states as follows:

"Negligence, where the proof is not certain and *incontrovertible*, is a question of fact."

Then, in the opinion by Allen, J., speaking of the matter as to when the question of negligence must be left to the jury, the court says:

"The question of negligence depends very much upon circumstances, and is addressed to the judgment of men of ordinary prudence and discretion, and is ordinarily for the jury. *When the inferences to be drawn from the proofs are not certain and incontrovertible it can not be decided, as a question of law, by directing a verdict of non-suit; it must be submitted to the jury.*"

The editor in the note cites 80 New York, 622; 91 *Ill.*, 427; 52 Hun., 268; 1 Abbot's Decisions, 131; 70 New York, 112.

The case of *Gaynor* v. *Old Colony and Newport Railway Co.* (100 Mass., 208), is a leading case in Massachusetts (and, indeed, in the United States) on this question as to when an act of alleged negligence is a question of law for the court, and when it must go to the jury. The court, at page 212, says:

"When the circumstances under which plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to."

The case of *Sullivan* v. *Railroad Co.* (154 Mass., 524–7–8), presents a case of what would seem to be extreme recklessness on the part of the plaintiff; and yet it was a case where the court held that it should go to the jury on the question of contributory negligence.

A similar holding is in the case of *Hannah* v. *Railroad Co.* (154 Mass., 529–33).

These decisions (other than the holdings of this court) have been here referred to, not because there is any uncertainty in the decisions of this court upon the subject—for there is no such uncertainty, as will be seen by the cases from this court which we present below—but because of the fact that we deal here with a case where a United States judge has, as we think, departed from the law on this most important question; and where we have thought that it was not amiss to show that, by the unvarying consent of all the courts, there is error in the ruling below as to this matter; and that the position

of this court is in accordance with the doctrines that are irradicably fixed in the common law of this country.

In the case of *Kane* v. *Northern Central Railway Co.* (128 U. S., 91), the following is the ruling upon the matter in question:

"In an action by an employé of a railroad company against the company to recover damages for personal injuries received by reason of the negligence of the company, in order to determine whether the employé, by recklessly exposing himself to peril, has failed to exercise the care for his personal safety that might reasonably be expected, and has thus by his own negligence contributed to causing the accident, regard must always be had to the circumstances of the case and the exigencies of his position; and the decision of this question ought not to be withheld from the jury *unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively establishes contributory negligence that the court would be compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor.*"

In the opinion in this case, by Mr. Justice Harlan, it is stated as follows:

"The Circuit Court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established that it would have been compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor. If the evidence (giving the plaintiff the benefit of every inference to be fairly drawn from it) sustained this view then the direction to find for the defendant was proper."

Citing—

Phœnix Insurance Co. v. *Doster*, 106 U. S., 30–2;
Randall v. *Baltimore and Ohio Railroad*, 109 U. S., 478–82;
Anderson County v. *Beal*, 113 U. S., 227, 241;
Goodlet v. *Louisville and Nashville Railroad*, 122 U. S., 391.

To the same effect is the case of *Jones* v. *East Tennessee*,

Virginia and Georgia Railroad Co. (128 U. S., 443), where the syllabus is as follows:

"When, in an action by an employé of a railroad company against the company to recover damages for a personal injury inflicted upon him by reason of an engine in motion striking him, it is conceded that the defendant company was in fault on account of the manner of running its trains, and the defense is set up that the plaintiff was guilty of contributory negligence, and there is conflicting evidence on that point, the plaintiff is entitled to have that question submitted to the jury."

In *Dunlap* v. *Northeastern Railroad Co.* (130 U. S., 649–52), the court holds what is thus stated in the opinion by the chief justice:

"The Circuit Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon *any view* which could be properly taken of the facts the evidence tended to establish."

Citing—

Kane v. *Railroad*, 128 U. S., 91;
Jones v. *Railroad*, 128 U. S., 443.

The same thing is decided by this court in the case of *Richmond and Danville Railroad Company* v. *Powers*, (149 U. S., 43, 45), where, in the opinion by Justice Brewer, it is stated:

"It is well settled that where there is *uncertainty* as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair-minded men will *honestly draw different conclusions from them.*"

Citing—

Railroad Co. v. *Stout*, 17 Wall., 657;
Washington and Georgetown R. R. v. *McDade*, 135 U. S., 554;
Delaware and Lackawanna R. R. v. *Converse*, 139 U. S., 469.

We have stated above (what is indeed self-evident without authority), from 2 Thompson on Negligence, that the same rules govern as to when a question of negligence on the part of the defendant may be withdrawn from the jury as apply to the question of contributory negligence on the part of the plaintiff; and that, therefore, cases are here in point which relate to the matter of withdrawing from the jury, in any case, *any* questions of fact. Hence we now turn to some of the decisions of this court as to when it is proper to withdraw evidence bearing upon facts, from the jury and determining them by the court.

IV.

The Right of Trial by Jury as Defined by this Court.

In regard to the question of law, when it is that a party is entitled, in an action where the Constitution secured a right of trial by jury, to have the verdict of the jury upon questions of fact raised by the pleadings in the case, this court, in the case of *Baylis* v. *Travellers' Insurance Co.* (113 U. S., 316–21), says:

"The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. (*Rev. Stats., secs. 648, 649.*)

"This constitutional right this court has always *guarded with jealousy.*"

Citing—

Elmore v. *Grymes*, 1 Pet., 469;
De Wolf v. *Rabaud*, 1 Pet., 476;
Castle v. *Bullard*, 23 How., 172;
Hodges v. *Easton*, 106 U. S., 408.

The court, in this case of *Baylis* v. *Insurance Co.*, defines the test as to when it is that the court may, in a case for jury trial, withdraw the testimony from the jury and direct a judgment as follows:

"If, after the plaintiff's case had been closed, the court had directed a verdict for the defendant on the ground that the evidence, with all inferences that the jury could justifiably draw from it, was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this court."

Citing—

Randall v. *B. & O. Railroad Co.*, 109 U. S., 478.

And the court further says, regarding such cases of jury trials, that—

"The court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon."

The same criterion is, in substance, given in the case of *Pleasants* v. *Fant* (22 Wall., 116–21–2) as to when the court may withdraw a case from the jury. There the court states the test thus:

"But, as was said by this court in the case of *Improvement Company* v. *Mason*, 14 Wall., 448, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge—not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Again, in *Marshall* v. *Hubbard* (117 U. S., 418–419), the court concludes its opinion in these words, defining the test as to when the court is justified in withdrawing a question of fact from the jury:

"Giving the defendant the benefit of every inference that could have fairly been drawn from the evidence, written and oral, it was insufficient to authorize a verdict in its favor. Such being the case, a peremptory instruction for the plaintiff was proper."

And this doctrine is explicitly reannounced in *Railroad Co.* v. *Cox* (145 U. S., 606), and *Goodlet* v. *Howard* (122 U. S., 411).

What has now been presented from the very highest authority of this country has, we submit, established beyond reasonable question our present position, to wit, that the court below erred in taking from the jury, in this case, every question of fact save the question of the *quantum* of damages—this unless the evidence, as submitted to the jury, established "incontrovertibly" each one of the following propositions of fact and law, to wit:

1. That such evidence established "incontrovertibly" that the defendant below was chargeable with negligence; and—

2. That the plaintiff below was chargeable with no contributory negligence.

And such error of the court below is incontestibly established, as just stated, even if it be assumed that the plaintiff below was not to be regarded as a trespasser at the time of receiving his said injuries.

From an inspection of the issues made by the pleadings, and an analysis of the testimony in the case, it is apparent that the following material questions of fact were, at the time the case was submitted to the jury, involved in the issues so submitted, and which the defendant below, the plaintiff in error, had a right, as a matter of law, to have passed upon by the jury; and the taking by the court, of said questions from the jury, as the Record shows was done, was a grave error:

1. The question whether the defendant in error, being then about 12 years of age, was so mature and intelligent, at the time his mother assented to his going upon the premises of the plaintiff in error, and at the time he was hurt, as to render it *not negligent* in the mother to assent to his going thereon under all the conditions under which the assent was given.

2. Whether the defendant in error, at the time he was injured, went upon said premises, where he was hurt, without the leave, assent (either express or implied), invitation, allurement, or knowledge of the plaintiff in error, or its agents.

3. Whether he went there without having any reason or business for so going other than to amuse himself, or from mere curiosity.

4. Whether, when on the premises, he did not, without any leave of plaintiff in error, or its agents, put himself in positions of obtrusion and danger; and whether he was not ordered to depart therefrom, and admonished that there was danger; and whether he did not disobey said order and continue loitering about and upon said premises after being so warned; and whether, had he obeyed said orders, he would have received said injuries.

5. Whether there was not a plain path across the space between the railroad tracks where the defendant in error received his injuries, which, had he observed, he could easily have followed and thereby escaped injury.

6. Whether, before and at the time of falling and receiving said injuries, he was not upon said plain path, and whether he was not guilty of negligence in running forward with his face turned in the opposite direction from that in which he was running at the time he fell

into the slack-pit and was injured; and whether, had he then been observing his footsteps, instead of looking back, he would have fallen and been injured.

7. Whether, at the time he so fell, the boys had not desisted from pursuing him, and whether there was then any occasion for his looking back instead of watching his steps and observing where he was going.

8. Whether the fact of his having fallen was not the cause of his being burned, and that, had he not fallen, he would not have been injured even had he stepped, in an erect position, into the same place where he received his injuries, and whether the cause of his falling was not that his foot slipped, and this because he was not observing his steps (*fol. 59*); and because of his mere negligence in looking back, &c.

9. Whether it was not indispensable to the business interests of the plaintiff in error, in conducting said mining business, that it should rid itself, and the premises, of the coal slack which accumulated on said premises in carrying on the mining of coal, and whether the plaintiff in error was not justified in consuming said slack by allowing it to ignite on its own premises at the place where the testimony tended to show that it did ignite.

10. Whether it was not a fact (which the testimony tended to establish) that no one—man, woman, child, or beast—had, during the years that the testimony tended to show that said burning of coal slack there occurred and continued, ever received any injury or inconvenience therefrom; and, if such was found to be the fact, whether the said burning, under said conditions, was either a public or a private nuisance, or dangerous to anybody; and whether, therefore, in suffering such burning, plaintiff in error and its agents were guilty of negligence as between itself and defendant in error.

11. Whether the plaintiff in error, under all the facts and conditions in the case, and under all the conditions of law and fact which will readily occur to the court (and which it is needless to here further refer to), had notice or reason to believe the said premises dangerous, and whether plaintiff in error was negligent in allowing the condition of things, existing at the time of the injury, to continue.

12. And also many other questions of fact or of mixed law and fact which will occur to the court, and which we will not here refer to.

We submit that it can not rationally be contended, much less established, that either one of the foregoing questions of fact which we claim should have been submitted to the jury, is a matter that was so conclusively established against the plaintiff in error as that it can be said of either or any of them that they were "incontrovertibly" so established against the plaintiff in error.

V.

Effect of Trespass upon the Right of Recovery.

But we now proceed to consider whether the plaintiff below was not, at the time of receiving said injuries, a mere trespasser upon the private property of the plaintiff in error, and, if so, what the effect of such trespasss is upon his right of recovery in the present case; and in determining this each of the following matters must be remembered:

1. The fact that the defendant in error was on the premises of the plaintiff in error is not disputed.

2. The fact that he was not expressly invited to go there by plaintiff in error is not disputed by the plain-

tiff himself, for he swears that he was not so invited (*R., p. 44, fols. 66–7*).

3. The fact that no allurements, inducements or invitations were held out to this trespasser to go upon the premises of plaintiff in error, either by means of the uses to which the premises were put, or by reason of there being any public way extending over the place where the alleged injury occurred, or by the character of the pathway worn between the tracks for the sole use of the miners in the employ of the company in going to and from their work (*R., p. 31, fol 49*), or by any other quality or characteristic of the locality, or the business of plaintiff in error, is not, we believe, disputed.

4. The fact that defendant in error was not a passenger on, an employé of, or in anyway connected with, the railroad is not disputed (*R., p. 44, fols. 66–7*).

5. The fact that he had no business object in going there is admitted (*R., p. 41, fol. 62, &c.*)

6. The fact that his mother permitted him to go, and that he went only for amusement, is sworn to by the mother, and is not disputed (*R., p. 26, fol. 40*).

7. The fact that he was ordered to leave positions of danger in which he had placed himself is both admitted and proved (*R., p. 32, fol. 51; also, R., p. 49, fol. 75*).

To say that under all these, and the other conditions shown by the Record, defendant in error was, nevertheless, not a trespasser, as stated to the jury by the court (*R., p. 52, fol. 79*), is inaccurate as a matter of law and fact, and is very far from being a conclusion which the court was "incontrovertibly" entitled to draw and to give to the jury.

And, in this connection, it is most important to keep in

mind that railroads, railroad stations and depots, and especially places where such work is being prosecuted as was being prosecuted at this station, and where switching, making up of trains, the loading and unloading of cars, etc., is constantly going on, are always and necessarily dangerous places into which to allow children to go for play, amusement, curiosity and loitering, as was done in this case. Such permission is, by necessity, negligence on the part of the mother or child, or both; and these elements of the case can not be ignored in determining whether the plaintiff below and his mother were guilty of contributory negligence in his being allowed to be there, as he was, or to be there at all.

VI.

What Makes Out "Leave" or "Invitation."

It is, as we interpret the Record, and was below, contended that all the conditions disclosed in the case amounted to invitation, on the part of the defendant below, to the plaintiff to come and be upon the premises of the plaintiff in error, as he was at the time of receiving his injuries.

The rule of law as to what, on the part of a defendant, shall constitute that which divests the fact of the entrance of a plaintiff upon the premises of the defendant, of the character of a "trespass," and makes his presence there lawful, is thus laid down by the Supreme Court of Massachusetts (opinion by Chief-Justice Bigelow), in the case of *Sweeny* v. *Old Colony and Newport Railroad Co.* (10 Allen, 368, 373):

"The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been

led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by the owner or occupier in a certain use of his land by others involves no liability; but if he directly, or by implication, induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

"This distinction is fully recognized in the most recent and best considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn."

The court then cites the case of *Corby* v. *Hill* (4 C. B., N. S., 556), and quotes from Chief Justice Cockburn the following sentence:

"The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto."

The court then proceeds with an examination of the authorities, and, from them all, deduces the rule of law which we have above quoted from the opinion of Chief Justice Bigelow. Other English cases cited in that opinion are—

Chapman v. *Rothwell*, Ellis, Blackburn & Ellis, 168;

Hounsell v. *Smyth*, 7 C. B. (N. S.), 738.

In regard to this case of *Hounsell* v. *Smyth* (7 C. B., N. S., 738), the court says:

"In the last-named case" (*Hounsell* v. *Smyth*) "the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger, and not on the owner. The same distinction is stated in *Barnes* v. *Ward* (9 C. B., 392), *Hardcastle* v. *South Yorkshire Railway, etc.* (4 Hurlst. & Norm. 67), and *Binks* v. *South Yorkshire Railway, etc.* (32 Law Journal (N. S.) Q. B., 26). In the last-cited case the language of Blackburn, J., is peculiarly applicable to the case at bar. He says: 'There might be a case where permission to 'use land as a path may amount to such an inducement 'as to lead the person using it to suppose it a highway, 'and thus induce them to use it as such.' See, also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant and those where nothing appears but a mere license or permission to enter on premises, *Balch* v. *Smith* (7 Hurlst. Norm., 741), and *Scott* v. *London Docks Co.* (11 Law Times (N. S.), 383)."

We have alluded to this case of *Sweeny* v. *Railroad* thus fully for two reasons—one, because of the clearness with which the distinction is made between a case where an invitation, inducement, or allurement is given, and where, on the other hand, a "bare license" is given; and the other is, because the case is by this court cited, relied on and approved (*Bennett* v. *Railroad Co.*, 102 U. S., 580), and because it has really become and is a leading case, not only in Massachusetts, but is followed in this country generally, so far as we have found.

This distinction here made between "mere license"

and invitation will be found in, amongst many others, the following cases:

Carleton v. *Steel Co.*, 99 Mass., 216, 217;
Coombs v. *Cordage Co.*, 102 *id.*, 584;
Minor v. *Sharon*, 112 *id.*, 487;
Larue v. *Hotel Co.*, 116 *id.*, 68;
Learoyd v. *Godfrey*, 138 *id.*, 315, 324;
Parker v. *Barnard*, 135 *id.*, 116, 118.

In this last-cited case (*Parker* v. *Barnard*) the following language of Justice Devens may with propriety be added to what we have quoted from the case of *Sweeny* v. *Railroad* (*supra*):

"It is certainly *well settled* that by the common law no duty is imposed on the owner or occupant of premises to keep them in a suitable condition for those who come upon them solely for their own convenience or pleasure, and who have not been either expressly invited to enter or induced to come by the purpose for which the premises are appropriated, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally, and reasonably lead them to suppose that they might safely and properly enter thereon. Where no such preparation is made, or express or implied invitation extended, and the entry of the licensee is permissive only, there can ordinarily be no recovery for a neglect properly to guard the premises by which such person may be injured. (*Sweeny* v. *Old Colony and Newport Railroad*, 10 Allen, 368, 373; *Severy* v. *Nickerson* 120 Mass., 306.)"

And see, especially, the case of *Galligan* v. *Metacomet Manufacturing Company* (143 Mass., 527–8) and the cases cited on page 528; and more especially the case of *Sullivan* v. *Railway Company* (156 Mass., 379), and cases there cited; also see *Plumber* v. *Dill* (156 Mass., 429), and cases cited.

This case of *Sweeny* v. *Old Colony and Newport Railroad Company* (*supra*) and its doctrines, are followed and reaf-

firmed in numberless other cases, (including the case in this court, *102 U. S., 580*), both in Massachusetts and throughout this country, as will, in part at least, appear from what we cite below upon another but kindred point.

The case of *Bennett* v. *Railroad Co.* (102 U. S., 577, *supra*), and which is relied on in the court below (*R. p. 56*), is one expressly recognizing the doctrines asserted above, namely, that, in order to make the owner of premises liable to a person who would be a trespasser at the place where he was injured, in the absence of some form of invitation to come upon the place where his injury was received, the owner of such premises, and the party sued for said injury, must, in order to create the liability, be affirmatively shown to have held out to such party some form of invitation, inducement, allurement, or some business reason, inviting the party injured to be at the place where he received his injury. This is expressly recognized throughout the opinion, and is thus expressed in the head-note:

"The owner or occupant of land who induces or leads others to come upon it for a lawful purpose is liable in damages to them—they using due care—for injuries occasioned by the unsafe condition of the land, or its approaches, if such condition was known to him and not to them, and he negligently suffered it to exist, without giving timely notice thereof to them or the public."

VII.

Rights of Mere Trespassers.

We next turn to the authorities upon the point as to what liability an owner, or occupant, of premises incurs towards one who is hurt upon such premises by reason of their dangerous condition, and where such one is there as a mere tresspasser.

This question is fully and carefully answered in 1

Thompson on Negligence, page 303 *et seq.*, section 3, and where the author's answer to this question is supported by ample authority. The author states as follows:

"The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon them, not by any invitation, express or implied, but for their pleasure, or to gratify their curiosity" (citing *Hargreaves* v. *Deacon*, 25 Mich., 1; *Gautret* v. *Edgerton*, L. R., 2 C. P., 371; 36 L. J., C. P., 191; 15 Week Rep., 638; 16 L. T., N. S., 17; *Stone* v. *Jackson*, 16 C. B., 199; 32 Eng. Law and Eq., 349; *Roulston* v. *Clark*, 3 E. D. Smith, 366; *Zoebisch* v. *Tarbell*, 10 Allen, 385; *Frost* v. *Grand Trunk Railroad Co., Id.*, 387; *Hounsell* v. *Smith*, 7 C. B., N. S., 731; 6 Jur., N. S., 897; 29 L. J., C. P., 203; 8 Week Rep., 227; *Balch* v. *Smith*, 7 Hurl. and N., 736; 8 Jur., N. S., 197; 31 L. J., Exch., 201; 10 Week Rep., 387; 6 L. T., N. S., 158), "however innocent or laudable their purpose may be" (citing *Kohn* v. *Lovett*, 44 Ga., 251). "Speaking of the existence of pitfalls in the highway and upon private property, a court says in reference to the duty of protection in the latter case: 'It applies less 'generally, and only to those who have a legal right to 'be there, and to claim the care of the occupant for their 'security while on the premises against negligence, or to 'those who are directly injured by some positive act 'involving more than passive negligence. Cases are 'quite numerous in which the same questions have 'arisen which arise in this case, *and we have found none* '*which hold that an accident from negligence on private* '*premises can be made the ground of damages, unless the* '*party injured has been induced to come by personal invita-*'*tion or by employment which brings him there, or by* '*resorting there as to a place of business or of general resort,* '*held out as open to customers or others whose lawful occa-*'*sions may lead them to visit there.* We have found no 'support for any rule which would protect those who go 'where they are not invited, but merely with express or 'tacit permission, from curiosity, or motives of private 'convenience, in no way connected with business or other 'relations with the occupant'" (citing *Hargreaves* v. *Deacon*, 25 Mich., 1, *per Graves, J.*). "This rule has been ap-

plied where a child came upon the defendant's premises at some distance from the highway and fell into an uncovered cistern" (citing *Hargreaves* v. *Deacon, supra*); "where the guests of a tenant, occupying a house on the rear end of a lot, instead of using a way which the landlord had opened for their egress through an adjoining lot, the direct egress being obstructed by some building operations on the front of the lot, undertook to grope their way through such unfinished buildings at night and were injured" (citing *Roulston* v. *Clark*, 3 E. D. Smith, 366); "where the plaintiff in going to a fire in the adjoining house ran through the defendant's store and fell into an excavation in the yard in the rear" (citing *Kohn* v. *Leavitt*, 44 Ga., 251); "where a person coming on the lands of a canal company fell into their canal, which, as was alleged, they 'wrongfully and improperly kept and maintained,' and was drowned" (citing *Gautret* v. *Egerton*, L. R., 2 C. P., 371), "and where a woman crossing the defendant's unfenced grounds, as many persons were accustomed to do in order to make a short cut and avoid an angle in the street, fell into an open and unguarded vault" (citing *Stone* v. *Jackson*, 16 C. B., 199; S. C., 32 Eng. Law and Eq., 349); "*where a person passing over an open tract of land, lying between two highways, fell into an unfenced mine, the court saying that persons thus licensed to cross the ground 'must take the permission with its concimitant conditions, and, it may be, perils'*" (citing *Hounsell* v. *Smith*, 7 C. B., N. S., 731), "and where a workman in a dock yard, having permission to use a water-closet, selected one of several paths leading to it, which led near some unfenced machinery, and, stumbling, caught his arm in the shafting and was injured" (citing *Bolch* v. *Smith*, 7 Hurl. and N., 736).

The recent work of Mr. Buswell on "The Law of Personal Injuries," section 140, page 211, contains the following statement as to what the effect of being in the act of committing a trespass is upon plaintiff's right of recovery for injuries he received while in the act of committing a trespass, and which injuries would not have been received but for the trespass:

"If the plaintiff, at the time of the occurrence of the injury complained of, is engaged in the doing of an unlawful act, which act may fairly be referred to as being the proximate cause of the injury, he can not recover for such injury. A familiar illustration of this rule is afforded in the case of a trespasser, it being commonly held that one unlawfully upon the land of another can not recover for injuries there received by him, unless such injuries were wanton or malicious on the part of the owner of the land, or the result of negligence so extreme on the part of the owner that wanton or malicious intent is to be inferred therefrom. The question in every case must be whether the unlawful act was the direct and efficient cause of the injury, and upon this question it is said: 'The best minds often differ upon 'the question whether in a given case illegal conduct of 'a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition 'of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own 'illegal act is an essential element of his case as disclosed 'upon all the evidence. Upon this point it is not necessary to reconcile the cases. * * * But whatever 'criticisms may have been made upon the decisions or 'the assumptions in certain cases—that illegal action of 'the plaintiff contributed to the result, or was to be 'treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition—there has been none upon the doctrine that, 'when a plaintiff's illegal conduct does directly contribute to his injury, it is fatal to his recovery of damages." (Per Knowlton, J., in *Newcomb* v. *Boston Protective Department*, 146 Mass., 596, 602; and see the cases cited on said page 602.)

The same author, in section 71, page 93, states the rule as follows:

"Generally, a trespasser upon the premises of another *assumes all risks* of danger arising out of the condition of the premises, and an act which might be negligent as to one whom the owner has invited or permitted to come upon the premises may not be negligent as to one *intrud-*

ing without the consent or knowledge of the owner. In other words, the liability of the owner is limited as to the trespasser, because the latter is a mere stranger to whom the owner owes no duty. Thus the owner of land is not, as to trespassers thereon, bound to fence in his land, or in any way to mark the boundaries of his possession. Nor is he bound to inclose obstructions to travel, as logs, etc., placed upon his land, or excavations unless these be so near the highway as to constitute a public nuisance. The owner of a building in process of construction is not bound to keep it safe as to trespassers entering it. But the mere fact that the plaintiff receives his injury while in the act of violating the law, or of invading the rights of the defendant, will not excuse a *wilful* injury of the plaintiff by the defendant, or an act of the defendant so recklessly negligent as to justify the presumption that the defendant was *wantonly* careless. For, although the owner owes no special duty to the trespasser, every member of the community owes to every other the duty of not *wantonly* exposing him to danger. Thus, although a trespasser who is injured by falling into an excavation made or permitted to exist upon the land of another, for a lawful purpose, can not recover damages therefor, yet the owner will be responsible if he keeps a ferocious animal upon his land, without notice, by which the trespasser is injured; for it is not lawful, without notice, wilfully to expose even a trespasser to bodily harm."

The following recent cases are cited by the author, to support what we have above quoted from sections 140 and 71:

Beck v. *Carter*, 68 N. Y., 283;
Early v. *Lake Shore, &c., Railroad*, 66 Mich., 349;
Stafford v. *Ingersoll*, 3 Hill, 38;
Wells v. *Howell*, 19 J. R., 385;
Trask v. *Shotwell*, 41 Minn., 66.

The opinion of Morton, J., in the case of *Marble* v. *Ross* (124 Mass., 44-8-9), states the law thus:

"It is true that, as a general rule, a trespasser who is injured by a pit or dangerous place upon the land of another, excavated or permitted for a lawful purpose, can-

not recover damages therefor, because the owner of the land owes no duty to him; and, therefore, is not negligent as to him; but it is clear that the owner of land cannot *wantonly* injure a trespasser. If he does, he is liable civilly as well as criminally."

Should the law be so wrought out by the courts that railroad companies and other industries, compelled to use, in their lawful business, and at places liable to be trespassed upon by all comers, the dangerous instrumentalities and means of their lawful business, and of which danger the business can not be divested, shall be compelled to pay for injuries received by mere loiterers and trespassers having no business at the places where they are injured, except amusement or curiosity, then it will be difficult, if not impossible, for such business to be carried on owing to the amount of damage to which their lawful business would be thus subjected.

Or, stating this in the words of Mr. Thompson, in his work on Negligence, volume 1, page 305: "It would put "the proprietors of real estate under an oppressive "burden to make them insurers against remote and im- "probable injuries to children" (and, for that matter, adults) "which may happen."

Conclusion.

We now conclude this discussion—no doubt needlessly protracted—by asking this court to reverse the judgment below, this in the light of these cases just cited, and gathered from about every great court of error existing in the English-speaking world; and which, without material dissent, assert each principle which we here urge upon the court—assert that "no case has been found "which holds that an accident from negligence on private "premises can be made the ground of damages, unless the "party injured has been induced to come, by personal

"invitation, or by employment which brings him there, "or by resorting there as to a place of business, or of gen- "eral resort, held out as open to customers or others "whose lawful occasions may lead them to visit there" (*1 Thompson on Negligence, 303*), and assert that "where "a person passing over an open tract of land lying be- "tween two highways, fell into an unfenced mine," the owner of the premises is not liable to the party injured— "the court saying that persons thus licensed to cross the "ground must take the permission with its concomitant "conditions, and, it may be, perils" (*1 Thompson on Negligence*, 304; *Hounsell* v. *Smyth*, 7 C. B., N. S., 731).

And we, moreover, and especially, so ask the reversal of the judgment below, under the force of that long line of decisions of this court—all asserting that you will not permit questions of fact to be taken from the jury where two honest opinions are possible as to what such facts *import;* and that you will guard with ceaseless jealousy, as this court has so often declared (*Baylis* v. *Insurance Co.*, 113 U. S., 321), this constitutional right of trial by jury.

In the light of all these, we ask that the judgment in this case be reversed, and the case sent back for a trial by jury, which the Record shows the plaintiff in error has not yet had.

JOHN F. DILLON,
SAMUEL SHELLABARGER,
JEREMIAH M. WILSON,
A. A. HOEHLING, JR.,
For Plaintiff in Error.

WASHINGTON, D. C.,
January 10, 1894.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.—No. 224.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

DAVID GEORGE McDONALD, by MARY McDONALD, HIS NEXT FRIEND, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF OF J. WARNER MILLS FOR DEFENDANT IN ERROR.

DARBY, Printer, 1308 Pa. Ave.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

DAVID GEORGE MCDONALD,
by MARY MCDONALD, his next friend,
Defendant in Error.

No. 224.

BRIEF OF J. WARNER MILLS FOR DEFENDANT IN ERROR.

This case has been twice tried. The first trial occurred in May, 1889, when a verdict of $2,500 was returned for the plaintiff. (Rec. p. 18, fol. 28.) This trial proceeded upon the amended complaint which was filed August 3, 1888. (Rec. p. 11, fol. 17.) This complaint was filed by permission of the court (Rec. p. 7), and was tested upon demurrer and held to be good. (Rec. p. 12.) There is no question in this court about the pleadings, either as to form or sufficiency. The said complaint counted on common law negligence only, on the part of defendant, which resulted in the injuries complained of. The verdict at the first trial was set aside by Judge Hallett, because he considered the same excessive under the proofs as adduced at said trial. (Rec. p. 57.) Before the second trial was had the plaintiff discovered that there was a statute in Colorado

compelling owners of coal mines to fence their slack piles and abandoned pits. The said statute is in words and figures as follows, to wit:

AN ACT to compel owners of coal mines to fence their slack piles and abandoned pits.

(Approved February 2, 1877. In force May 3, 1877.)

SECTION 1. That the owner or operators of coal mines from which fine or slack coal is taken and piled upon the surface of the ground, in such quantities as to produce spontaneous combustion, shall fence said ground in such manner as to prevent loose cattle or horses from having access to such slack piles. (G. L. 1877, p. 126, Sec. 137; Mills Ann. Stat., Sec. 3202.)

SEC. 2. All owners of lands having abandoned coal pits or shafts on the same, of sufficient depth to endanger the life of cattle, horses or other stock, shall fence or fill said pits or shafts in such a manner as to afford permanent protection to all such stock endangered thereby. (G. L. 1877, p. 126, Sec. 138; Mills Ann. Stat., Sec. 3203.)

SEC. 3. Every person violating sections one (1) and two (2) of this act shall be deemed guilty of a misdemeanor and shall be fined in a sum not less than twenty (20) dollars nor more than one hundred (100) dollars, to be collected as other fines are collected, and shall be further liable to any party injured thereby in the amount of the actual injury sustained. (G. L. 1877, p. 126, Sec. 139; Mills Ann. Stat., Sec. 3204.)

On the 12th of December, 1889, plaintiff was granted leave to amend his said amended complaint by interlineation, so as to show the violation of the said statute on the part of the defendant—alleging in effect that the said coal slack was not spread out in thin layers on the ground, but was taken out of the said mine, operated as aforesaid by the defendant, and piled up on the surface of the ground in such quantities as to produce spontaneous combustion: and that the same caught fire by spontaneous combustion. And that because of the liability of said slack pile to spontaneous combustion, and because of the public place wherein the said burning slack pile was, and its locality being frequented by the adults and children of the said town of Erie and those visiting the same, and the cattle grazing thereabout, and because of the fire therein being concealed as aforesaid, it became and was the duty of the said defendant company long before and at the time of the happening of the injuries complained of, either to have extinguished the said fire or to have removed the same

or to have fenced the said slack pile, or to have put some sufficient sign and warning notifying the public of the danger of going in or upon the same. (Rec. p. 19, fol. 30; and pp. 9 and 10, fols. 14 and 15.) With the complaint as thus amended, counting both upon common law negligence and statutory liability as well, the said case came on for second trial June 18, 1890, before the Hon. Henry C. Caldwell, Circuit Judge. (Rec. p. 21.) Upon this trial several material witnesses were introduced by plaintiff, that he was unable to procure at the first trial, and his case was accordingly greatly strengthened: and the plaintiff at this trial exhibited his wounds and scars to the Judge and jury and witnesses, which was not done at the first trial. (Rec. p. 36, fol. 56; p. 45, fol. 69; p. 46, fol. 71; p. 47, fol. 72; p. 48, fol. 74.) The charge of the court to the jury is to be found in the Record at pages 50 to 54. The verdict returned at this trial for the plaintiff was in the sum of $7,500. (Rec. p. 21, fol. 33.) On the 18th of June, 1890, judgment was entered upon the said verdict in favor of plaintiff for the sum of $7,500. (Rec. p. 22.) Defendant's motion for new trial was overruled June 26, 1890. (Rec p. 22.) The opinion of the court, overruling the motion for new trial, is to be found in the Record at pages 56 to 58. The defendant brought the case into this Court on error from the aforesaid judgment, entered in favor of plaintiff and against defendant.

I.

THE FACTS ARE ABSOLUTELY UNDISPUTED AND ARE OF SUCH CONCLUSIVE CHARACTER AS THAT RATIONAL MINDS COULD REASONABLY DRAW BUT ONE CONCLUSION FROM THEM.

(a) *Of the coal shaft and its surroundings.*

The situation of the bed of fire and the depot and the town of Erie and the shaft house of the coal mine

and the several railroad tracks are all set out in the map that will be found at page 28. This map or diagram was furnished by R. J. Van Valkenburg, and there is no question made as to its correctness, and it was duly admitted in evidence. (See Rec. pp. 29 and 30; also bottom of p. 26 and top of p. 28.) It will be seen that there is a pile of rock between the main track and the long switch. Said pile is about sixteen feet high. This pile had been taken out of the coal shaft and consisted of rock and shale that would not burn. It is marked "pile" on the map. (Testimony of R. J. Van Valkenburg, Rec. p. 27.) This witness also speaks of this as being the "west pile" (Id.). From this pile to the depot the distance was four hundred and ninety-eight feet, and the width between the main track, which was nearest the town of Erie, and the first or long switch, is about sixty-eight feet (Id.). The shaft house, containing shaft, boiler and engine, has a small switch passing directly through it. This switch was used to push cars under the chute, filling them from the coal hoisted out of the shaft. (Rec. p. 27; p. 29, fol. 46; p. 32, fol. 50.) The shaft house was sixteen feet high and there was also a weigh office sixteen feet above the ground just above where the coal was thrown into chutes and screened into the different cars standing on the side track below. (Rec. p. 27; p. 29, fol. 46.) On the west side of the shaft house there was a door. (Rec. p. 30, near top.) These premises are known as the Boulder Valley shaft and mine, which was operated by the defendant company at the time of the accident and was so operated for some two years previously. (Rec. p. 26, fol. 41.)

(b) *Where the fire was, and the years it had been burning.*

The main track was one going from Erie to Boulder, and the main switch was to the east of this main

track, and a long and wide trench had resulted from the throwing up of the dirt between these two tracks, said trench having the dimensions before named of nearly five hundred feet in length and sixty-eight feet in width. (Rec. p. 29.) The part of the diagram stained red indicates the fire. The coal slack was dumped by defendant into this trench between the long switch and the main track, and took fire by spontaneous combustion, "and reached down to within a short distance of the depot." (Testimony of Mr. Van Valkenburg, Rec. p. 27, fol. 42.) In the year when the accident occurred—1884—James Morrison testified that "the fire was burning within twenty feet of the depot," and that the slack "pile had been burning in that place for about two or three years." (Rec. p. 30.) The witnesses all agree without any exception that this slack pile had been burning in the said trench for several years. (See Rec. p. 28, fol. 49), where Mr. Van Valkenburg puts the time at about two years. (Rec. p. 31, fol. 49.) J. W. Makin says, "The slack pile had been burning there in that way about two or three years." (Rec. p. 31, fol. 49.) Wm. Francis says that "the pile had been burning for years." (Rec. p. 30, fol. 47.)

(c) *How the fire was dangerously concealed.*

The witnesses all agree also as to the character of the fire. Mr. Van Valkenburg says "that the fire was covered over with ashes, because the ashes had settled on top. When the wind blew the fire would blaze up and when it rained or snowed you could see steam, but as a rule the fire did not show at all." (Rec. p. 27, near middle.) William Francis says "that the coal slack was all on fire all over the pile, burning from the bottom on up through, ashes show on top of it, and the fire could not be seen. It was burning on through and

had been burning: it was red hot: on top of the slack was fire clay and slate and ashes, white and red ashes, and that you could not see smoke except when the wind blew or there was rain or snow, but ashes covered up the fire." (Rec. p. 29.) And "that the fire had been burning there for years quite close to the top." (Rec. p. 30, near top.) James Morrison testifies "that the slack pile was covered with ashes and that the fire could not be seen; . . . when on the path the heat from the burning slack could be felt only when the wind blew." (Rec. p. 30.) J. W. Makin testifies that *at the time of the accident* there was nothing to indicate that there was any fire there; that a *man* who had seen it would walk right in it; would not know that there was any fire: nothing but brown ashes: came up within forty feet of the depot." (Rec. p. 31.)

(d) *This concealed fire was not fenced as required by statute, nor was any warning given the public.*

We call to the attention of the Court the undisputed testimony of Mr. Van Valkenburg that "there was no fence around the slack pile nor any guard of any kind: entirely open, and no placards of any sort warning a person of danger: and no persons to guard the premises." (Rec. p. 27.) The plaintiff testifies that there was no guard nor any kind of fence around it; that at first he was afraid to go up for fear there might be some sign, "No Admittance" or something like that, but there was no sign, and nobody said a word to him except the fellow that said for him to get out of the way of the car, up in the top of the house. (Rec. p. 37.)

(e) *This concealed pit of fire was only 500 feet from a populous village.*

The accident occurred September 3, 1884. (Rec. p. 23.) At that time the population of the town of Erie

was about six hundred, and "most of this six hundred had families, the children being of various ages." (Rec. p. 28, at top.) The hotel where the plaintiff was stoping in the town of Erie was only five or six hundred feet from the coal shaft. (Testimony of R. J. Van Valkenburg, Rec. p. 28.) It will be seen by the map that there is a road and bridge leading up to the depot from the little square indicating the hotel.

(f) *The operations of this coal shaft were attractive, and young and old were allured there.*

There is no conflict of evidence as to the permission given by defendant to all persons, adults and children, to come upon the ground, and for children to come there *for play or curiosity.* Mr. Van Valkenburg says "the miners' children were accustomed to go over there just as they pleased and went there frequently. *Twenty or more there a day went over near the shaft.* Children were allowed to go and pick up and carry home coal. Anybody was allowed to go there, and children were never ordered away or prohibited from going there, to the knowledge of the witness. They were always accustomed to go over there since the mine was worked." (Rec. pp. 27 and 28, fol. 43.) William Francis testifies that "men, women *and children* came there and were *in the habit* of coming there *to see the mine operated.* They had drifts and galleries hundreds of feet in length and he had been working on the mine for sixteen years. . . . He had frequently, *nearly every day, seen children play around there,* and they were allowed to go around the machinery where the shaft was, and this was allowed during all the years this mine was operated. . . . That during *the time he worked there he never heard of any objections to children coming on the premises or of their being driven off.*" (Rec. p. 29.) James Mor-

rison testifies "that he was working in this coal shaft in 1884, and had been acquainted with it a good many years before and after," and that "*strangers coming to the town about the first look they take is over to the mine and engine. They are so near the town, and for curiosity they often walk over*: never heard of anybody, *children or others*, being driven away from the works." (Rec. p. 30.) J. W. Makin testifies: "*Children used to go around there at all hours of the day*, some to get coal, others to bring their fathers' dinner, and some *would go over just to see the place*: and this condition of affairs was allowed or conducted during all the time witness was there. . . . He had worked on and off at the mines since 1873." (Rec. p. 31.)

(g) *The footpath was rough, narrow, irregular and sloping to the fire, almost touching it.*

The testimony is also harmonious as to the character of the footpath around this burning slack bed. Mr. Van Valkenburg testifies "that from the town there was a bridge crossing over the creek, and from there a pathway crossing over the tracks and up to the shaft, making an irregular path around the west pile up to the shaft. . . . That the footpath which ran around the said west pile and over the tracks was about eighteen inches to two feet wide. . . . That the fine coal that was dumped by the company always took fire after a certain time and this path was just a narrow one, a little bit above the fire, sort of a rim running around the fire about eighteen inches wide. . . . That a path was probably eighteen inches above the slack pile where the boy stepped off." (Rec. pp. 27 and 28.) He also says "that the irregular path which would be traveled in going and coming from the shaft was the one pointed out to him on his diagram near to the place where the boy fell in." (Rec. p. 28, fol. 44.)

We observe here, however, that this witness only knows from hearsay where plaintiff fell in. William Francis testifies "that the path spoken of by the other witnesses ran close to it (the slack pile), almost touched it (the burning slack pile), being eighteen or twenty inches in width. Stones were sticking up here and there in the path and it was not level, but slanted toward the fire. . . . And the only traveled path he knew was the one marked on the diagram, was the one by which the miners generally went to their work. . . . That the path was a pretty rough path, about on a level with the ashes of the burning slack pile, but the path was of different stuff than the slack pile." (Rec. pp. 29 and 30.) James Morrison testifies that "the path was about eighteen inches wide and near the level of the trench. It was rough and slanting down toward the fire: . . . that the path above it could not be *easily* seen: that while you could undoubtedly *see* it, still a person could not *follow* it clearly, plainly and easily, and *ladies* going to the graveyard would avoid it and did not want to travel it." (Rec. p. 30.) J. W. Makin testified that "the path was up and down on a slant toward the slack pile; that it was a plainly defined path and was used by the miners in going to and from the town to the shaft. There was no other path." (Rec. p. 31.) Max Greenfield, a witness called by defendant, testified that he had "heard the other witnesses describe the path. It had been traveled a year or more, and several years by the miners and those around the mines. Was an ordinary footpath." (Rec. p. 49.)

It will be noticed that the general character of this footpath is agreed to by all the witnesses. While it was an "ordinary footpath" they admit that it was narrow, not to exceed eighteen inches or two feet in

width, and was rough, uneven, irregular, slanting toward the fire, and nearly touching it, forming a sort of rim around it, but it was only *in this way* that it was "a plainly defined path," and while one "could undoubtedly *see* it" he could not "*follow* it clearly, plainly and easily": and while *men* might use it going to the graveyard, still "ladies going to the graveyard avoided it and did not want to travel it." No witness swears it was not narrow, rough, uneven, irregular and slanting to the fire, almost touching it, or that it could be *followed* easily. And no witness swears it had no stones sticking up. These details regarding the path remain wholly unchallenged and undisputed. Still one speaking very generally might say that it was an "ordinary" footpath and "plainly defined," for we all have often known of footpaths with many of the wretched qualities of this.

(h) *No other coal mine was within a mile of Erie, but still they all were more careful with their slack.*

The witnesses also agree that the slack from this coal mine, deposited as it was, became a different and a greater danger than that of any other coal mine with which they were acquainted. Mr. Van Valkenburg testifies that "in all the coal mines in which he had any acquaintance they dumped their slack on the surface of the ground and let it burn: and that in those cases it would not be down like this between two railroad tracks, but *upon a level*. . . . As to the slack pile of other coal mines, that the difference would be that in other mines you would have to walk up on to it; and in this place you would step down into it; and that there were other coal mines within a mile of this, but no other coal mine as near to the town of Erie, nor within a mile of said town." (Rec. p. 28.) This same witness also testifies that the de-

fendant did not dump all their fine coal there (meaning in this slack pit) but a portion of it was carried further down and dumped in another place, and that in that place it was also burning. "That the witness had known of cattle getting in and being burned more than a year before the boy was burned, and that the agents of the defendant knew this fact." (Rec. p. 27, fol. 43.) William Francis testified that "as a rule they hauled the slack, the fine coal, away and dumped it on the prairie or elsewhere, and that in all such cases when a large amount was piled up it would take fire." . . . (Rec. p. 29.) He was evidently speaking of other mines, for of this particular mine he says on his cross-examination, "the company's method of getting rid of their waste and fine coal was by taking it in that place, [the slack pit] and letting it burn." (Rec. p. 30, fol. 47.) J. W. Makin testified that "the Jackson, Marfell and Mitchell mines used to throw their slack out, but they used to scatter it so it would not burn." (Rec. p. 31.)

(i) *The accident and immediate injuries.*

September 3, 1884, the plaintiff, who was then twelve years and eight months old, went with his mother to the hotel of Mr. Van Valkenburg, in Erie. (Rec. p. 23.) In the forenoon after arriving the plaintiff went with a boy that lived next door, who was a trapper, up the creek, taking their dogs, to look at some traps. (Rec. p. 32, fol. 50.) The boy with whom he went up the creek in the forenoon worked at the coal mine, and was going up at one o'clock to relieve some one. The plaintiff, *after dinner*, secured the permission of his mother to go also to the mine, and he soon followed up after his trapper friend, whom he saw in advance of him. (Rec. p. 32.) He went around the west pile, as it is called, and came up on the main track of the rail-

road at the point farthest from the depot, and where the switches connected with the said track. Whether the plaintiff would have gone closer to the shaft than he then was, no one can tell. He was at a point where he could see them shooting the coal into the cars; and such observation may have been sufficient, and for all the Record shows the plaintiff would have been satisfied to make his observations wholly from that point, while there he was entirely out of range of the burning slack pit, which has been fully described above; and the pile of rock and shale sixteen feet high, called the west pile, lay between his *then* point of view and the aforesaid burning slack pit. But he was expressly invited by one of defendant's servants to go to the shaft, or to come further upon the premises of defendant.

The plaintiff says that at this point where he stood upon the switches there was a man who had a crowbar; and that he was trying to shove a freight car; that he put it under the car but could not start it. At last he threw the crowbar away and got down and tried to push it and could not. He saw the plaintiff and said, "Kid, give me a lift or a push." The plaintiff assisted him, the car was started and pushed continuously until a point was reached where it would run of its own momentum toward the shaft house, and the plaintiff was thanked for this assistance. (Rec. p. 32, fol. 50.) The man, after taking this car down in the manner described, went for another. In this way plaintiff was expressly invited to go closer to the shaft, and did go there. He went up where they were pushing out coal and chuting it into the cars below, taking it from the mine in little push-cars. He was told to stand out of the way of these little push-cars, and did so. (Rec. p. 32, fol. 51.) He walked around there for about ten minutes, looked down the shaft, and at last walked away, no one

having otherwise spoken to him than as last mentioned. He then walked up near the shaft to see them put down some mules. After the mules were put down he heard some yelling and laughing, and turned and saw five or six boys with lamps on their hats : their faces were dirty and one of them yelled, "Let's grease him," and another "Let's burn him." And they started for him. (Rec. p. 33.) He ran across the track of the switch. He saw some person standing on the "*bank* like it was" (evidently referring to this west rock pile and to J. W. Makin, who was standing only four feet away in the footpath), (Rec. p. 31, at top), and he tried to go past him, and as he did so something slipped. He went down on his head and face. He tried to get out and put his hands down, but was all the time sinking, and at last was about smothered to death when some one pulled him out. He could not hear or see. The ashes were in his mouth, ears and eyes : ashes and fire. He was helped out and taken to the hotel, and it was found that he was severely burned. He was unconscious when brought to the hotel and remained so for some time after. The sleeves of his coat were cut away and the coat was taken off by cutting the same with scissors. The ashes were down his throat and up his nose, and blood was running from his forehead into his eyes and mouth. His hands and neck and face and arms were all badly burned. His coat and vest were burned in front and his pants all full of holes, and his hat lost. The pain and suffering was intense and a physician was called at once to attend him. (Rec. p. 34.)

The plaintiff's mother testified that it was immediately after dinner that she consented to let him go to the coal mine, and that he was soon brought back to the hotel by parties carrying him. (Rec. p. 23.) That his clothes were cut off, the skin and flesh were hang-

ing from his hands and arms, burns on his forehead, and his forehead was bleeding, and his neck was burned and legs and feet: that he had on new calfskin shoes, and was burned around the ankles: his hat was gone and his clothes had to be cut off. He was burned through on the elbow more than on any place; his pants were burned in little holes all over. Three or four young men carried him to the hotel. His hands and arms were done up with linseed oil and rye flour and he was put under the influence of opiates. The next day fever set in and he was delirious. (Rec. p. 23.) His hands and arms were swollen so much that his mother feared blood poison: his arms were swelled about twice the natural size up to his shoulder, and he screamed with pain. The doctor in attendance talked of amputation, and the mother then insisted that the boy should at once be taken to Denver, which was done. (Rec. p. 24.) He was obliged to hold his hands up, and was confined to his bed about three weeks: while in bed was restless, nervous and weak, and had no appetite: he suffered a great deal of pain. The deepest burns turned into running sores: they were on part of his right hand and both of his wrists and both elbows. They were running sores for three or four months. Dr. Smythe was the attending physician. He was subpœnaed as a witness both by plaintiff and defendant (Rec. p. 45, at bottom), and of course plaintiff was obliged to call him. His testimony will be found on pages 44 and 45 of the Record. His recollection as to the events is very imperfect. He didn't know that there were any burns on the forehead, but examined the forehead before the jury and then found a scar that refreshed his memory. (Rec. p. 45, fol. 69.) It was upon the testimony of this physician that the defendant sought to reduce the amount of the verdict,

and succeeded in doing so at the first trial when Dr. Smythe was the only physician called on behalf of the plaintiff.

Mr. Van Valkenburg says he saw the boy when brought to his hotel after being burned. "Some men carried him into the house and placed him on a lounge or bed; that he was all covered with ashes and his clothing and his sleeves and hands were burned and his shoes were crisp, and he appeared to be suffering a good deal; also had a burn on the side of his neck and face; the boy remained there about three days." (Rec. p. 26, fol. 41.)

The landlady at the hotel, Mrs. Van Valkenburg, testified "that she should think that the boy was delirious from the screams and fuss he made; that his hands and arms were badly burned and his clothes were burned. . . . She had other duties to perform about the hotel; only knew he was badly burned and screaming at the top of his voice; and he was at their house three days." (Rec. pp. 28-29.)

The accident as described by J. W. Makin was as follows: He says he had started for his home and "heard some one crying out and he saw the boy come running and saw him step over into the fire; that some trappers had scared him and he was running for home and fell over into the fire. These trappers were boys down in the mines for the purpose of leading the mules. The boy, George McDonald, was running in the direction of a path that led to the town. He ran into the fire and fell onto his hands and face. He (witness) was standing about four feet off from him in the footpath. He went in and pulled him out and found his hands all burned, skin hanging from the hands and fingers and was burned in his back and clothes: that he helped carry him to the hotel, the boy not being

able to walk. That at the time of the accident there was nothing to indicate there was any fire there. That a man who had never seen it would walk right into it; would not know there was any fire—nothing but brown ashes. . . . When the boy fell he was running toward the town; that he had not at that time quite arrived at the path. He was running across the tracks; he was making for the path and running across—took a short cut for the path and fell into the fire." (Rec. pp. 30 and 31.)

(j) *The extent of plaintiff's injuries.*

Besides the pain and suffering and the character of the burns detailed above, the evidence shows that the plaintiff was constitutionally and seriously affected. His mother says that "before the accident he was a very robust boy from his birth." (Rec. p. 24.) Following the accident she further testifies that he was troubled with nervousness; was restless and would scream in his sleep; wake up and stay awake for two or three hours at night; and this continued nearly all the first year after he was burned; that he never had any such trouble prior to the accident; that prior to the accident he slept well and had a fair appetite; that following the accident a urinary trouble set in and he had a nervous twitching of his eyes, which greatly impaired his eyesight and required his mother to take him to several oculists; that this nervous twitching of the eyes continued for years after the accident, but was better at the time of the trial; that he had never had anything of the kind before he was burned; that his eyes were still very weak. (Rec. p. 25.) That his wrists were very weak, manifested in his playing or in lifting or at work; he had no use of one of his fingers; that his general health since the accident had been entirely impaired. (Rec. p. 25.)

The plaintiff himself testifies that he had to put his hands in a certain position to go to sleep: that they would get like they were dead, and this condition continued months after the accident: that following the accident he could not urinate until there was the sound of the fall of water, for which the doctor gave him something, but it seemed to do no good: and that his mother or some one had to pour water from a distance that the sound might help him: and that condition remains with him at the present time. (Rec. p. 35.) He tells how greatly this troubled him when at school, and says there was a long tin pan where the boys went and that he was generally the first one to go in and the last to come away: that the noise from the others helped him some: that he never had any trouble of this kind prior to the accident. (Rec. p. 35, fol. 55.) He further says he was pretty near blinded and his sight is badly impaired: that his eyes get to twitching. (Rec. p. 35, fol. 55.) He further says that he went into the office of Dr. Dameran, a dentist, to work: that he had trouble with his hands or wrists, and the doctor used to tell him his hands were not as strong as a boy half his age. He could not screw down the vulcanizer. (Rec. pp. 35 and 36.) He tells how the vulcanizer was to be used and how impossible it was for him to have strength enough in his wrists to use it. (Rec. p. 36.) He was learning dentistry with Dr. Dameran, but had to give it up on the above account. (Rec. p. 50, fol. 77.) And then took up printing. (Rec. p. 50, fol. 77.) The third finger of the left hand was dead, cord seemed to be burned: and he had no control of the muscles in that finger, and showed the jury that it would not close. (Rec. p. 36, fol. 56.)

Dr. Dameran testifies that he is a dentist and had the plaintiff, George McDonald, in his employ: that the

plaintiff seemed weak in one hand or arm; always complained of it and could not do the work of other boys of his age and size; that he was the only boy of his age and size that was not able to put his vulcanizer down; and the witness had had experience with ten or twelve boys. (Rec. p. 47, fol. 72.)

Dr. Smythe, to whom we have referred above, testified that "*present appearances* indicate that all the burns of the plaintiff were superficial. Don't know whether a person falling into burning coals could escape without a shock or not. Never discovered any nervous symptoms at that time that he remembered of; there was inflammation in his arms, which was confined to the burns, perhaps a little more than that; presumes there was some swelling away above the burns." (Rec. p. 45.) This witness further testified that he did not apprehend any serious difficulty arising from the nature of the burns nor any difficulty to the boy's urinary organs. He says, however, "it was impossible at that time to tell how much stiffness would be left in his hands; always more or less contraction following a burn; frequently disappears in time, unless the burn is very deep and does not affect the joint; didn't think he was apprehensive of the joints stiffening at the time; thinks there was no joint trouble." (Rec. p. 45.)

He further says, on re-examination, "don't remember of swearing at the former trial that he considered these burns very severe; the burns were severe as far as suffering was concerned, but in a constitutional way they were not." (Rec. p. 45, near middle.) And this witness admitted on his re-examination that he testified at the former trial that "the hands were pretty badly burned." (Rec. p. 45, at bottom.) Dr. Lewis, who is a physician of twenty years, practicing in Denver, testifies "the

particular results to a boy of McDonald's age, burned as he was, would be a very severe burn, which would necessarily be a very severe shock to the nerves. . . . Besides the nervous shock there are often physical effects produced by burns that are entirely remote from the location of the burn. A person may be burned on the skin severely and there will come ulcers on the lungs which will produce consumption. (Rec. p. 46, fol. 70.) . . . This burn was a severe one, and the physician ought to have looked for almost anything in any part of the system, especially the internal organs. A burn may affect urinary organs by producing ulcers on the organs of the urinary track." (Rec. p. 46, fol. 71.) . . . "If a burn is severe he looks for more serious consequences than from one that is limited. The burns this boy had I should call *very severe, not superficial burns.* If the skin and flesh is sloughing off it is a severe burn, not a superficial burn." (Rec. p. 47, fol. 72.)

Dr. Wheeler, one of the most reputable physicians in the city of Denver, who has practiced there for more than eighteen years, testifies that "he examined the burns on the hands and wrists of the plaintiff." He says that the scars indicate that "some of the burns were deep. In case of a boy having an accident, such as George had, it is quite possible for constitutional symptoms to follow, and particularly at the age of twelve years, about the changing from childhood to manhood. Witness says twelve years because the heightened condition of the nervous condition of a girl or boy at the age of puberty makes a susceptibility of the nervous system greater than any other, so there may be troubles arising from injuries or shocks to the nervous system occurring at that time that would not come at a later or at an earlier time in life." (Rec. pp. 47

and 48.) "Nervous excitement is a very common origin for other nervous diseases to arise, and this is particularly true of the urinary organs. Any nervous shock has a tendency to produce specific relaxation or a spasmodic condition, alternating perhaps, of the urinary organs." (Rec. p. 48.) "As to there being a connection between the shock, fright and burns, and the urinary trouble, would say that the symptoms might arise from the shock, and also from the wounding of the terminal nerves of the skin. Either might be capable of producing such symptoms." (Rec. p. 48.)

On cross-examination, Dr. Wheeler further testified that he first examined the witness in the fall of 1889. "Examined particularly the scars on his hands and arms: that it is possible to tell nearly six years after a burn has taken place whether it is superficial or deep. A deep burn goes through the skin and into the flesh. A burn through the skin is a deep burn; a superficial burn is where the first, the scarf skin, is destroyed. A burn that would not blister might be too deep to be either a superficial one or one that would raise a blister. . . . The effect of a shock, fright or excitement on a grown person in perfect health would pass away. In the excitable state of a child passing childhood to puberty, it might come at a time that would make a permanent condition; it may not: it may be only transitory: the change from childhood to puberty occurs in boys usually at about twelve years. It may vary a great deal as it does in girls. The change is sometimes months in occurring; sometimes years: on an average it would take nearly a year. (Rec. pp. 48 and 45.)

(k) *The day of the accident was calm and fair and the state of the weather did not tend to disclose the fire.*

The plaintiff's mother testifies that "the 3d of September, 1884, was a nice warm day, calm, no wind."

(Rec. p. 25.) J. W. Makin testifies "that he was working for defendant at the mines in September, 1884: that it was a nice, calm day." (Rec. p. 30, fol. 48.) This was the witness who pulled the plaintiff out of the fire and helped carry him to the hotel.

The plaintiff testifies that the day was sunshiny and pretty warm; that it was calm. "There was no wind or rain or anything like that: the sun was shining bright." (Rec. p. 37.)

(l) *Neither the plaintiff nor his mother knew anything about this hidden bed of fire.*

Mrs. McDonald testified: "I never knew or heard anything about this burning slack pile until after this accident." (Rec. p. 25, near bottom.) The plaintiff testified that he saw nothing but a little bed of ashes: it didn't look like there was any fire, and he did not know there was any fire there before he got into it. (Rec. p. 37, at top.)

(m) *The foregoing was plaintiff's evidence, and all the evidence offered or received upon the trial; except that defendant had two witnesses, Greenfield and Miller, sworn, the substance of whose testimony was as follows:*

Max Greenfield testified that the slack pile was burning there from 1881 to 1884. The company was *in the habit* of depositing its fine coal there and letting it burn out: that he saw the boy come up from below to the weigh office; he says this was in the forenoon between eleven and twelve: heard Mr. Miller call some one to go away; that that was no place for him, there was danger, to get down: he would not go: they both called him to go away from there and get down; he finally left, only told him at that time to go down: did not see him at any other time. He says he had heard

the other witnesses describe the path, but in no way criticises their testimony, simply saying it was an ordinary footpath traveled a year or more. (Rec. p. 49.) On his cross-examination this witness said that he did not see that boy in the afternoon; it was in the weigh office upstairs. The witness was there in the afternoon of the same day; heard some boys hollering; went toward the window, and saw some one picking up the boy from along the pathway where the slack was that was on fire. Witness says he thinks he could tell the boy now; saw him at the other trial, but would not swear that it was George McDonald up in the weigh office the forenoon who was hurt; but whoever the boy was he simply told him to go down stairs.

On his redirect examination witness says, "this was all he told him and plaintiff did as he was told, which was as far as he knows about it." (Rec. p. 49, fol. 76.)

W. K. Miller was the second and last witness sworn by defendant. He says he saw the boy there in the morning about ten and eleven on the day of the accident. Says he could not swear positively as to the plaintiff; that it was the boy that was burned that forenoon. That he told him to get off (referring to the stairs or weigh scales mentioned in the testimony above of Max Greenfield). Says he blacked his face, and that this was a short time before the accident, which he thinks was before dinner, but all of the above is qualified in the following words: "Didn't see the boy after he was burned; only as he was going across after it had happened; he was being led and carried together, I believe; from what he saw of plaintiff then could not identify him as the one who was there before; didn't know who the boy was when he was there in the forenoon; didn't know him then, don't know him now, and can't identify him." (Rec. p. 50, at top.)

The above was all the evidence adduced by defendant; and the same can be admitted without changing any material facts established by the proofs of the plaintiff. Greenfield and Miller left the boy to whom they were referring wholly unidentified, but even if it be admitted the boy they saw was the plaintiff, he was merely told to get off the weigh scales upstairs, where the push cars were, and did as he was told.

II.

THE INSTRUCTIONS OF THE COURT WERE PREDICATED WHOLLY UPON THE FOREGOING STATE OF FACTS, AND ARE FULLY JUSTIFIED THEREBY.

This Court has said that "questions of negligence in actions like the present one are ordinarily for the jury under proper direction as to the principles of law by which they should be controlled. But it is well settled that the Court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court, in the exercise of a sound judicial discretion, will be compelled to set aside a verdict returned in opposition to it."

> Delaware, Lackawanna and Western Railroad Company *vs.* Converse, 139 U. S., 469 (March 30, 1891).
> See also, R. R. Co. *vs.* Ives, 144 U. S., 408, 417.

The opinion in this case was delivered by Mr. Justice Harlan. The plaintiff counted only upon common law negligence, and the court below instructed the jury as matter of law that the railroad company was negligent in respect to its duty to persons traveling upon the public road in question, and that the plaintiff was entitled to recover damages for any injuries sustained

by him as the result of such negligence, unless it appeared that he contributed to such injuries by his own carelessness. This instruction of the lower court was assigned for error, and the assignment was held to be not well taken. The jury returned a verdict for $14,000, and plaintiff remitted all but $7,500, and judgment entered for said sum was sustained in this Court, notwithstanding the question of negligence on the part of defendant, as above stated, was wholly taken away from the jury.

Numerous cases are cited in the opinion of Mr. Justice Harlan, sustaining the action of the court below in the matter in question. We submit that upon the admitted facts in the case at bar there is even a stronger reason than in the Converse case for taking the case from the jury on the point of defendant's negligence. For we have here an express statute that was persistently violated by the defendant and that too for more than a year after it had notice that cattle had been burned up in the slack pit. (Rec. p. 27.) The plaintiff had a right to assume that there was no hidden furnace in the slack pit, and that defendant would conform its conduct to the express requirements of the law, and not bring injury upon him by its violation.

> Jetter *vs.* New York and Hudson River Railroad Company, 2 Abb., Ct. App. Dec., 458.
> Hayes *vs.* Mich. Cent. R. R. Co., 111 U. S., 228.
> State *vs.* Boston & Me. R. R., 58 N. H. 408, 410.

In the present case it is not necessary to inquire whether this statute, as shown by its title and the last clause of the third section, applies to persons as well as animals; for under the doctrine of this Court in the case of Hayes *vs.* Michigan Central Railroad Company, 111 U. S., 228 (1884), and under all of the adjudged cases of other courts, the failure of defendant

to comply with this statute was at least evidence of negligence. But as defendant adduced no proof, nor was there any offered by plaintiff, to counterbalance or destroy this presumption of negligence, the court had a right, and it was its duty, to say under the admitted facts as they appeared at the trial, that the defendant was guilty of negligence by its omission to fence the slack pile. Moreover, it is apparent that the failure to fence, in this instance, was the proximate cause of the injury. The fence itself, at the point in question, would have compelled the boy to have gone around this concealed bed of coals instead of trying to run across and through it. This pit of fire was maintained for years within a few feet of the public depot and within about five hundred feet of a town containing six hundred inhabitants, many of whom were children. The children had been allowed for years to play about there, and this was an attractive point for both children and adults; and visitors coming to the town, whether young or old, made this the first point to visit, because its operations were attractive and it was so near to the heart of the village.

If a person on board the cars took exercise as the cars stopped at the depot, and stepped only twenty or thirty feet from the train, whether to pick a flower or for any other purpose, either in daytime or night, they were at once in danger of plunging headlong into this concealed furnace. Under the admitted facts in this case we contend that the defendant deliberately, continuously and heedlessly maintained this concealed bed of coals about five hundred feet in length and more than fifty feet in width, in utter disregard of the rights of the general traveling and visiting public. It was a nuisance *per se*. It was as dangerous to adults who were ignorant of its existence as it was to children, and it was at a place

where adults and children were both accustomed to go and allured to go.

In the case of the Hydraulic Works Company *vs.* Orr, 83 Pennsylvania State, 335, the court by Agnew, Chief Justice, upheld a verdict for damages at the suit of a trespasser, upon the theory that the occupier of the premises "has reason to apprehend danger, owing to the peculiar situation of his property, and its *openness to accident*, and that the spot was not so private and secluded as that a man might keep dangerous pits or deadfalls there without a breach of duty to society." The above case is quoted approvingly and applied in the late and interesting case of Crogan *vs.* Schiele, 53 Conn., 186 (1885). This Connecticut case shows what slight facts will constitute an *implied* invitation to come upon one's premises, and what facts will constitute an allurement. After quoting the case of Hydraulic Works Company *vs.* Orr, *supra*, the court in the Connecticut case of Crogan *vs.* Schiele says: "The turntable case of Railroad Company *vs.* Stout, 17 Wall., 657, and that of Birge *vs.* Gardiner, 19 Conn., 507, proceed upon the same general theory. See also Haughey *vs.* Hart, 67 Iowa, 98; Young *vs.* Harvey, 16 Ind., 314. Shearman and Redfield on Negligence, p. 599, say: 'Of course it is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land and using that right with ordinary care.'"

We might upon this phase of the case cite numerous authorities, but will refer the Court only to a few which we think are directly in point and will stand examination.

> Sioux City Pac. R. R. Co. *vs.* Stout, 17 Wall. 657 (1874). S. C. Judge Dundy's instructions, 11 Am. Law Reg. 226. S. C. On motion for new trial, 2 Dillon, 294.

Atlanta Cotton Seed Oil Mills *vs.* Coffee, 80 Ga., 141.

Powers *vs.* Harlow, 19 North Western Rep., 257 (1884); this is a case in Michigan and the opinion was written by Judge Cooley, and the doctrine of the *Stout* case is expressly recognized and vigorously applied.

Malloy *vs.* Hibernia Sav. and Loan Soc. (Cal., Apr. 22, 1889), 21 Pac. Rep., 525.

Gulf, Colo., & S. F. Ry. Co. *vs.* Stryron, 66 Tex., 421 (1888).

Evansich *vs.* Ry. Co., 63 Tex., 54.

Ry. Co. *vs.* Fitzsimmons, 22 Kan., 686; S. C., 31 Am. Rep., 203.

2 Thomp. Neg., 1188, §2.

Nagel *vs.* R. R. Co., 75 Mo., 653.

Keffe *vs.* R. R. Co., 21 Minn., 207.

Twist *vs.* Winona & St. P. R. R. Co., 39 N. W. Rep. 403, note citing late cases

Jos. A. Pfiffner *vs.* Chi., Mil. & St. P. Ry. Co., N. Dist Iowa, Eastern Div., decided by Mr. Justice Brewer, on the circuit, but not reported.

Nicholas, Admr., *vs.* Washington, O. and W. R. Co., 83 Va., 99, 102-3.

Ind., Bloom. and West. Ry. Co. *vs.* Barnhart, 115 Ind., 399, 408 (1888).

In the case last cited the court say at page 399: "As affecting the claim, that there was nothing shown from which negligence could be imputed to either one of the railroad companies, it may be said that the general rule is that where an obligation is imposed by a statute it is negligence *per se* to disregard the obligation thus imposed, and if injury is thereby inflicted the party disregarding the statute is liable."

It is negligence *per se* not to observe a duty imposed by statute.

St. Louis & R. R. Co., *vs.* Huggins, 20 Ill. App., 639.

See also, Grand Trunk Ry. Co. *vs.* Ives, 144 U. S., 408.

See Black on Proof and Pleadings in Accident Cases, p. 97, Sec. 79.

In Buswell on Personal Injury, Sec. 77, it is said:

"But that act is not to be deemed mischievous or wanton which the defendant does in the ordinary course of his business, and by the use of appliances which *do not obviously, and of necessity expose all persons who may approach there to peril, or the exposure of which is not attended with some concealed danger.*"

Citing, Schilling *vs.* Abernathy, 112 Penn. St., 437.

The attack made upon the instructions given by the court overlooks the principle that they are to be construed with reference to the evidence on which they are based. 2 Thompson Trial, section 2408.

The charge is entitled to a reasonable interpretation. (Castle *vs.* Bullard, 23 How., 172, 189.) The court left the matter of contributory negligence clearly to the jury, although we contend that upon the admitted facts there was no evidence tending to prove contributory negligence. The court expressed its opinion upon some of the facts as is the practice in the federal courts. Mr. Justice Gray says, in the case of the United States *vs.* Philadelphia, etc., Railroad Company, 123 U. S. 113, 114: "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence and to instruct the jury upon the law, but also when in his judgment the due administration of justice requires it to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination."

See also, R. R. Co. *vs.* Putnam, 118 U. S., 545; St. Louis, &c., R. R. Co. *vs.* Vickers, 122 U. S., 360.

This was clearly done in the case at bar, for after expressing his opinion on the facts he tells the jury: "If you find he (the plaintiff) did not see the fire and could not with the exercise of reasonable diligence discover it, and did not know it was there, and that the surface of the pit apparently presented a safe footing and passage, then he was not guilty of negligence in attempting to run across." (Rec. p. 53.) He had previously defined what contributory negligence was. (*Id.*) He further told the jury, on page 54, fol. 81, "You are the sole judges of the facts," and he concluded by telling the jury if they found for the defendant to simply say, "We, the jury, find for the defendant." (Rec. p. 54.) There can be no question but that the matter of contributory negligence was distinctly submitted to the jury, notwithstanding the facts were undisputed; and the jury must have so distinctly understood, otherwise the instruction to bring in a verdict for the defendant in a certain form, could have had no meaning or application whatsoever.

We do not discuss the question as to the plaintiff having been a trespasser, for we submit that the facts clearly show that he was not, and that he was personally invited upon the premises of defendant after going to the switches; and that he was at any rate, *allured and attracted* there as the record shows many others were, both children and adults; and that this fire was so concealed and dangerous as to be a "trap;" and even conceding the plaintiff was a trespasser the company owed him at least the duty that at that place, and under the circumstances even the common law would impose, and that the statute did impose upon it, to build a fence around the slack pit.

We submit, however, that the defendant is in no position on the record to take advantage of verbal criticisms of the instructions given by the trial court. The instructions were written out and counsel should have indicated, as particularly as he now has in his assignment of errors, just what was objectionable. His exception is simply to the charge in general, after it was delivered to the jury, on all the general matters stated by the court as to the negligence of the defendant and the contributory negligence of the plaintiff.

We admit that the question of negligence was expressly taken from the jury, and we assert that it was rightly done, but we deny that the court took the question of contributory negligence from the jury, or intended to so take it. It is argued now that such was the effect because the court, on page 52, said "the disputed issue in the case is the question of damages." This is simply a verbal criticism. The court had just prior to that distinctly submitted to the jury the question of contributory negligence and they could not have been misled by that language. They understood the same undoubtedly as the judge intended it, to apply to the character of the argument made by defendant's counsel. His chief position and main argument addressed to the jury to which the court had listened was based upon the testimony of Dr. Smythe, and in view of that testimony he vigorously, ably and laboriously maintained that the injuries the plaintiff sustained were not permanent, but only temporarily serious and painful, and that the verdict should accordingly be but little more than nominal, not to exceed at most the verdict that had been returned by the previous jury. When the charge is construed with respect to the facts as they stood admitted, and with respect to the arguments made by counsel before the jury, there

can be no question but that the charge *taken as a whole* was distinctly understood by the jury as taking from them only the question of defendant's negligence and as requiring them still to find and pass upon the facts in relation to the alleged contributory negligence of plaintiff.

It is not a ground for a new trial that the instructions were indefinite as to some particular element of the case, provided more definite instructions were not requested and refused. Smith *vs.* Carrington, 4 Cr., 62; Carver *vs.* Jackson, 4 Pet., 1; 2 Thomp. Trial, Sec. 2346.

It will be seen that the defendant's exception to the charge of the court on contributory negligence was not specific, but general, and it has only been made specific in the assignment of errors. Moreover, the defendant in his motion for new trial clearly waives this general exception, for the only ground in the said motion so far as the instructions are concerned is as follows: "(4th.) Because the court erred in instructing the jury on its own motion." (Rec. p. 55.) We submit that this was a clear abandonment of the exception taken at the trial. The attention of the lower court has never been called to the use of the words "the disputed issue in this case is the question of damages." Had such attention been called, the sentence would undoubtedly have been so changed as to make it impossible even when detached from its connection with the then condition of the case before the court, to claim that the question of contributory negligence was withdrawn from the jury. It seems clear that this and other verbal criticisms of counsel might easily have been made by the court below and perhaps properly, and still in no wise have affected the real essentials of the instructions or the substantial result of the deliberations of the jury.

If the attention had been specifically called at the time to any particular part of the charge that was deemed erroneous, the necessary correction could have been made. An exception to an abstract part of the charge gave no information whatever as to what was in the mind of the excepting party and therefore gave no opportunity to the trial court to correct any error contemplated by it.

> Illinois Central R. Co. v. Welch, 194 U.S. 361
> Pennsylvania Co. v. Lynch, 90 U.S. App. 574
> Wilcox v. American Tobacco Company, 111 U.S. 687

It will be noticed that the sentence the disputed issue in the case is the question of damages. Defendant is not in reference to anything said concerning the negligence of the company or the contributory negligence of the plaintiff. It was simply said as a sort of summing up upon the important question of damages which had been the burden of the argument by defendant's counsel before the jury. If that language is to be construed as having the effect for which counsel contend, we must confidently submit that this Court certainly will not fix the trial judge the injustice to make a correction which he was denied the opportunity to make, through the inattention or inadvertence of counsel.

In view of the motion for a new trial subsequently made it would seem that the specific assignments of error now counted on were an afterthought and the attempt is now made for the first time in this Court to secure corrections that could easily have been secured in the lower court had they simply been asked.

Inasmuch as the case has now twice fairly tried by two juries and two verdicts have been returned favorable to the plaintiff and nearly ten years have intervened since the said accident occurred and the only errors now

counted on in this Court are verbal criticisms of the charge by the trial judge, *specifically* indicated here for the first time, it seems to us that upon the entire record, and in view of all the admitted facts and the single conclusion to which they irresistibly point, this case should at last be ended and the judgment affirmed.

J. WARNER MILLS,
Attorney for Defendant in Error.